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OPINIONS

OF THE

# OFFICE OF LEGAL COUNSEL

OF THE

UNITED STATES DEPARTMENT OF JUSTICE

CONSISTING OF SELECTED MEMORANDUM OPINIONS
ADVISING THE

PRESIDENT OF THE UNITED STATES
THE ATTORNEY GENERAL
AND OTHER EXECUTIVE OFFICERS OF THE FEDERAL GOVERNMENT

IN RELATION TO

THEIR OFFICIAL DUTIES

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EDITOR
Margaret Colgate Love

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# Foreword

The Attorney General has directed the Office of Legal Counsel to publish selected opinions on an annual basis for the convenience of the executive, legislative, and judicial branches of the government, and for the convenience of the professional bar and the general public.* The first three volumes of opinions published covered the years 1977 through 1979; the present volume covers primarily 1980. The opinions contained in Volume 4 include some that have previously been released to the public, additional opinions as to which the addressee has agreed to publication, and opinions to Department of Justice officials that the Office of Legal Counsel has determined may be released. A substantial number of Office of Legal Counsel opinions issued during 1980 are not included.

The authority of the Office of Legal Counsel to render legal opinions is derived from the authority of the Attorney General. Under the Judiciary Act of 1789 the Attorney General was authorized to render opinions on questions of law when requested by the President and the heads of executive departments. This authority is now codified at 28 U.S.C. §§ 511–513. Pursuant to 28 U.S.C. § 510 the Attorney General has delegated to the Office of Legal Counsel responsibility for preparing the formal opinions of the Attorney General, rendering informal opinions to the various federal agencies, assisting the Attorney General in the performance of his function as legal adviser to the President, and rendering opinions to the Attorney General and the heads of the various organizational units of the Department of Justice. 28 C.F.R. § 0.25.

Included in Volume 4 are 11 formal Attorney General opinions issued during 1980. These opinions will eventually appear in Volume 43 of the Opinions of the Attorneys General. In light of the long interval between volumes in that series (*e.g.*, Volume 42 covers the years 1961 through 1974), the Attorney General has determined that it would be appropriate and useful to inaugurate the practice of including formal opinions of the Attorney General in the annual volumes of Office of Legal Counsel opinions.

Also included in Volume 4, as a separate section with its own foreword, are 25 opinions dealing with the issues which arose out of the seizure on November 4, 1979 of the U.S. Embassy in Tehran and the taking of 52 American hostages. These opinions were issued over a 15-month period between November of 1979 and February of 1981, and include two formal Attorney General opinions.

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*The Editor acknowledges the assistance of Joseph Foote, Esq., in preparing these opinions for publication.

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# OPINIONS

OF THE

# ATTORNEY GENERAL OF THE UNITED STATES

January 17, 1980, through October 10, 1980

## Imposition of Agricultural Export Controls Under § 5 of the Export Administration Act of 1979

**Export of agricultural commodities can be restrained under the national security controls of § 5 of the Export Administration Act of 1979 only if the exports in question constitute "a significant contribution to the military potential" of the importing country.**

**Whether grain exports will contribute significantly to the military potential of the Soviet Union is a question of fact for the President to determine.**

January 17, 1980

THE COUNSEL TO THE PRESIDENT

MY DEAR SIR: I am responding to your memorandum of January 14, 1980, regarding the availability of § 5 of the Export Administration Act of 1979, 50 U.S.C. App. § 2404, as a basis for the imposition of agricultural export controls on exports to the Soviet Union. I agree that there is sufficient factual basis to conclude that the invasion of Afghanistan by the Soviet Union threatens the security of neighboring countries, including Pakistan, and therefore threatens our security as defined by § 3(2)(A) of the Act, 50 U.S.C. App. § 2404(2)(A). I also agree that § 7(g)(1) of the 1979 Act contemplates that under appropriate circumstances the export of agricultural commodities can be restrained under the national security controls of § 5. *See* 50 U.S.C. App. § 2406(g)(1).

The remaining question is whether exports of grain in the amounts involved here constitute "a significant contribution to the military potential" of the Soviet Union as required by § 3(2)(A) of the 1979 Act. The quoted language first appeared in the Export Administration Act in 1962. Between 1949, when the Export Administration Act was first adopted, and 1962, the President had been empowered to impose national security controls over exports based upon a standard of "necessary vigilance over exports from the standpoint of their significance to the national security." Act of Feb. 26, 1949, § 2.[1]

In 1962, the 1949 Act was amended to limit the use by the President of national security controls. The "national security" ground was reformulated to authorize export controls "if the President shall determine that such export makes a significant contribution to the military *or economic* potential of" (emphasis added) a nation to be subjected to restrictions. This amendment clearly expressed a congressional determination that the contribution made by any embargoed goods be both significant and related to either the military or economic sectors of the foreign country involved.

---

[1] I note that the 1949 Act, as has every amendment to it since, singled out agricultural commodities for special consideration with regard to export controls. The 1979 Act reemphasizes that historic concern, setting forth in § 3(11) a policy "to minimize restrictions on the export of agricultural commodities and products."

In 1969, Congress further restricted the "national security" power over exports by removing, over the objection of spokesmen for the Nixon Administration, the phrase "or economic" from the language of what is now § 3(2)(A). This amendment was proposed in a bill cosponsored by then Senator Mondale in order to restrict the President's power over exports.

The legislative history and evolution of the President's power to control exports in the name of "national security" is instructive with regard to interpretation of the critical language in § 3(2)(A) in two regards. First, the goods to be embargoed must make a significant—as opposed to a minimal or marginal—contribution to military potential. The structure of the 1979 Act and its legislative history suggest that this significance may be based on either the volume or the nature of any particular proposed export. Second, this "significant contribution" must have an articulable factual nexus to "military potential."

Your memorandum of January 14, without stating a basis for its conclusion, assumes the basic factual predicate to invocation of § 5. At the time I wrote my memorandum of January 10,* none of the agencies with access to the relevant information had come forward with facts that would establish a nexus between the grain embargo and the military potential of the Soviet Union as required under § 3(2)(A). You now advise that the Deputy Secretary of Defense has concluded on the basis of intelligence reports and historical experience: (1) That the denial of grain in the amounts involved here will significantly undermine public support among the Soviet populace for the Afghanistan invasion; and (2) that this deterioration of public support will undercut the resolve of the Soviet leadership to continue the occupation of Afghanistan. On this ground the Deputy Secretary of Defense has determined that these grain shipments make a significant contribution to the willingness and ability of the Soviet leadership to continue military operations in Afghanistan, and this resolve on the part of the Soviet leadership is an essential component of the "military potential" of the Soviet Union.

---

* NOTE: In a memorandum dated January 10, 1980, the Attorney General recommended to the President that he rely only upon § 6 of the 1979 Export Administration Act, and not upon § 5, in connection with his imposition of agricultural export controls. Section 6 authorizes export controls "to the extent necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations." 50 U.S.C. App. § 2405(a)(1). Ed.

The reason you advance in your January 14 memorandum for invoking § 5 as well as § 6 "when the action is clearly supportable under § 6 alone," is your judgment that the reliance on national security grounds will decrease the chances of a significant effort to organize a two-house veto as the statute provides in the case of § 6 actions. But there will be a report under § 6 in any event. And if there are to be hearings and if a resolution of disapproval is to be introduced, as we suspect will happen in any event, the procedural vehicle will be available. I also understand that it is your judgment, as well as the general consensus of the other involved agencies, that such a resolution of disapproval will fail regardless of whether we rely on § 6 alone or on both §§ 5 and 6. Therefore it is difficult for me to understand what strategic advantage is to be gained by including § 5.

I understand that you have put forward a second argument, which is not included in your January 14 memorandum, to the effect that President Carter said in the 1976 campaign that he would cut off grain sales to the Soviet Union only when national security required. But it seems rather clear from the series of campaign statements that the President in 1976 was not talking in the technical language of the Export Administration Act. He clearly served notice at that time that armed aggression by the Soviet Union which threatened our allies would constitute the kind of extreme circumstance in which it might be necessary to cut off the export of grain as well as other goods and materials to the Soviet Union. Whether the particular action would be taken under § 5 or § 6 of the Export Administration Act was not the issue. The President's action of blocking exports in this case is consistent with his 1976 statements.

In sum, the question whether the grain exports at issue here contribute significantly to the military potential of the Soviet Union is a question of fact. That question is for the determination of the President, and if he makes such a determination on the facts of this case he is authorized to invoke § 5. However, it is my view that the wiser course is to proceed on the basis of § 6 alone. I believe that the controversy and debate that will be generated in the Congress over the President's invocation of the limited national security authority provided under the Export Administration Act will unnecessarily cloud the real issue, which is the decision to cut off these grain shipments to the Soviet Union.

Sincerely,
BENJAMIN R. CIVILETTI

# The President's Authority to Regulate Extensions of Credit Under the Credit Control Act

**Under the Credit Control Act, the President is authorized to regulate and control extensions of credit whenever he determines that such action is necessary for the purpose of preventing or controlling inflation generated by the extension of credit in an excessive volume.**

**Proposed executive order announcing the President's determination, and proposed implementing regulations of the Board of Governors of the Federal Reserve System imposing controls on certain kinds of consumer credit, on money market funds, and on managed liabilities. are within the authority granted the President and the Board under the Credit Control Act.**

March 13, 1980

THE SECRETARY OF THE TREASURY

MY DEAR MR. SECRETARY: I am responding to your March 13, 1980, request for my opinion concerning a recommendation by the President's economic advisers that the President, by executive order, authorize the Board of Governors of the Federal Reserve System to regulate and control certain extensions of credit under the Credit Control Act, 12 U.S.C. § 1901 *et seq.* You have forwarded to me, for my information, copies of an executive order proposed by the President's advisers, and of regulations proposed by the Board to effect certain credit controls that the Chairman of the Board of Governors has informed you the Board will consider issuing if the order is executed. You have asked me whether the recommended order would constitute a proper exercise of the President's authority under the Act, and, if the President issues the order, whether the proposed credit control measures transmitted to you by the Chairman would be within the Board's authority under the Act.

Under 12 U.S.C. § 1904, the President may authorize the Board "to regulate and control any or all extensions of credit" whenever he:

> determines that such action is necessary or appropriate for the purpose of preventing or controlling inflation generated by the extension of credit in an excessive volume, . . .

The proposed executive order would announce such a determination by the President, would authorize the Board both to regulate or control three types of extensions of credit and to prescribe appropriate requirements as to the keeping of records with respect to all forms of credit, and would order that such authorizations remain effective for an indefinite period and until revoked by the President. Each of these measures, as explained below, constitutes a proper exercise of the President's authority under the Act.

Although the Act includes no particular requirements for the form of the President's determination under § 1904, the incorporation of his determination in an executive order that specifies the Board's consequent authorities is entirely appropriate. Further, the President is empowered by the Act, §§ 1904, 1905, to determine what types of extensions of credit are appropriately subject to the Board's regulation and to authorize the Board to implement any or all of the regulatory measures specified in § 1905. This is evident from both the language of §§ 1904 and 1905, and from the legislative history of the Act,[1] which amply reflect Congress' intent to give the President the most flexible authority possible in mounting, through the control of credit, an appropriate attack on inflation.[2]

Finally, § 1905 provides that the Board's authority to implement credit controls shall exist "for such period of time as [the President] may determine." This authorizes the President to specify the duration, whether definite or indefinite, of any control authority, which he would be doing if he issues the order as drafted, *see* § 1-106.

The Chairman of the Board has informed you that, if the President executes the order, the Board will consider issuing three regulations to effect certain credit controls. These credit controls would be within the authority granted by the order. They would specifically address the following kinds of extensions of credit—consumer credit, activities of "money market funds" and similar entities, and the managed liabilities of commercial banks that are not members of the Federal Reserve System—the regulation of which is authorized by the order. Further, because the order does not limit the kinds of controls that may be imposed on these extensions of credit, the controls would be within the Board's authority if they are anywhere authorized among the controls listed in 12 U.S.C. § 1905. I conclude, as explained below, that each of the proposed controls is among the measures authorized by that section.

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[1] *See* H. Rep. No. 755, 91st Cong., 1st Sess. 11 (1969); H. Conf. Rep. No. 769, 91st Cong., 1st Sess. 11 (1969); 115 Cong. Rec. 39649-697, 40239-244, *passim* (1969), especially at 39660 (remarks of Rep. Sisk); 39669, 40241 (remarks of Rep. Patman); 39676 (remarks of Rep. Barrett); 39683 (remarks of Rep. Ottinger); 39684 (remarks of Rep. Matsunaga); 39673, 39674, 40240, 40242 (remarks of Rep. Sullivan).

[2] Despite the flexibility of the authority vested both in the President and the Board of Governors of the Federal Reserve System, the Act does not transgress the constitutional prohibition against excessive delegations of legislative power. The determination required of the President, that action "is necessary or appropriate for the purpose of preventing or controlling inflation generated by the extension of credit in an excessive volume," 12 U.S.C. § 1904, provides an adequate standard against which the terms of the President's authorization and the Board's subsequent actions may be assessed. *See AFL-CIO* v. *Kahn*, 618 F.2d 784, 793 n.51 (D.C. CIR. 1979) (en banc), *cert. denied*, (1979); *Amalgamated Meat Cutters and Butcher Workmen* v. *Connolly*, 337 F. Supp. 737, 744-763 (D.D.C. 1971) (three-judge court).

The consumer credit regulation would require that certain creditors extending certain kinds of consumer credit maintain a special non-interest bearing deposit with the Federal Reserve equal to a specified percentage of the amount by which certain types of the creditor's outstanding consumer credit would exceed a designated base. This control is designed to discourage the expansion of consumer credit. It is expressly authorized by § 1905(10), which permits the Board to prescribe "maximum ratios, applicable to any class of . . . creditors . . . of loans, of one or more types or of all types . . . (B) to assets of one or more types or of all types." In this case, the Board would be establishing maximum ratios between consumer credit loans extended in excess of the designated base and both the amount of assets available to covered creditors to support such loans, and the amount of assets to be deposited with the Federal Reserve. Such a requirement would also limit the circumstances in which credit in excess of the designated base could be extended, and would be within the Board's authority under § 1905(11) to "prohibit or limit any extensions of credit under any circumstances the Board deems appropriate."

The money market fund regulation would require such funds and similar entities to maintain a special non-interest bearing deposit with the Federal Reserve equal to a specified percentage of the amount by which the extensions of credit by them exceed their outstanding extensions of credit on a specified date. The covered entities typically act as financial intermediaries, accepting funds from investors for the purchase of "money market instruments," i.e., various instruments of indebtedness with short-term maturities that are issued by governmental units, corporations, or individuals. The intent of the regulation is to curb inflation by curbing the volume of credit available through money market funds and similar entities. Like the control to be imposed on certain extensions of consumer credit, the requirement that money market funds maintain special non-interest bearing deposits would be authorized by § 1905(10), because it would establish a maximum ratio between these funds' net extensions of credit and both their net increases in assets available for such extensions of credit and their assets to be deposited with the Federal Reserve. Such a requirement would also limit the circumstances in which money market funds may make further extensions of credit and is authorized by § 1905(11).

The managed liabilities regulation contemplates a requirement that commercial banks that are not members of the Federal Reserve System maintain a non-interest bearing special deposit with the Federal Reserve equal to a specified percentage of the amount by which the total of certain managed liabilities of the covered banks exceeds a base amount of such liabilities outstanding. The covered liabilities would include extensions of credit to the covered banks that such banks typically use to support the credit they themselves extend. The intent of the contemplated requirement is to discourage the expansion of credit by the covered institutions. It is authorized by § 1905(10), which permits the Board to "prescribe maximum ratios, applicable to any class of . . . borrowers . . . of loans, of one or more types or of all types . . . (B) to assets of one or more types or of all types." In this case, the Board would prescribe a maximum ratio between certain credit that can be extended to a bank and both its increase in assets available to support extensions of bank credit and its assets to be deposited with the Federal Reserve. The proposed control would also limit the circumstances under which credit would be extended to covered banks, and is thus within the authority of § 1905(11).

You will note that, in determining whether the proposed control measures would be within the Board's authority under the Act, I have relied exclusively on the language of the Act and on the anti-inflationary intent of the measures. Because the legislative history of the Act does not elaborate on the scope of the control provisions of § 1905 and does not suggest that Congress' intent is in any way inconsistent with the Act's plain meaning, we conclude that control measures that are covered by the plain meaning of the statute and that relate to its purpose are authorized. Each of the proposed measures meets these standards.

In sum, the executive order, if executed, will be a proper exercise of the President's statutory authority and, if the President issues the order, the proposed credit control measures will be within the Board's authority under the Act.

Sincerely,
BENJAMIN R. CIVILETTI

# Authority of the United States Olympic Committee to Send American Teams to the 1980 Summer Olympics

**The Amateur Sports Act of 1978, 36 U.S.C. § 371 *et seq.*, does not compel the United States Olympic Committee to send American teams to any Olympics.**

**The United States Olympic Committee may withdraw its delegation at any time before final entries are made.**

**The Amateur Sports Act of 1978, 36 U.S.C. § 371 *et seq.*, does not create any substantive right in an individual athlete to participate in a particular Olympic.**

April 10, 1980

THE PRESIDENT

MY DEAR MR. PRESIDENT: You have requested my opinion on the question whether the United States Olympic Committee (USOC) has a legal duty, under the Amateur Sports Act of 1978, 36 U.S.C. § 371 *et seq.*, to send a team of American athletes to the Summer Olympic Games in Moscow. For reasons stated below, it is my opinion that no tenable argument can be made that the USOC is required to send an American team to the Moscow Games. To the contrary, I believe that the Amateur Sports Act gives the USOC discretion not to send a team to any particular Olympic Games, including the Moscow Games.

There would appear to be only two conceivable bases for an argument that the USOC is legally bound to send an American team to the Moscow Games.[1] One argument might be that the Amateur Sports Act of 1978 grants no discretion to the USOC to refuse to send an American team to any particular Olympic Games no matter what the circumstances might be. Another argument would be that the Amateur Sports Act of 1978 creates in individual athletes a substantive legal right to compete in any particular Olympic Games if they otherwise qualify to compete on the basis of their performance in competition with other athletes for berths on our Olympic team. I will address each of these arguments in turn.

The Amateur Sports Act of 1978 recognized and established the USOC as a federally chartered corporation, *inter alia,* to "exercise exclusive jurisdiction . . . over all matters pertaining to the participation of the United States in the Olympic Games . . ." § 104(3), 36 U.S.C. § 374(3).[2] The creation of the USOC as a corporation rather than a government agency is, I believe, important to an understanding of its powers regarding the participation of an American team in any particular Olympic Games. Although the USOC does not have all the powers normally associated with a private corporation, such as the power to issue capital stock,[3] its creation as a corporation having most of the powers associated with private corporations suggests quite strongly a congressional intent to vest in it wide discretion to take any action not specifically precluded by the Amateur Sports Act of 1978.

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[1] We do not believe that § 202(a)(5) of the Amateur Sports Act of 1978, 36 U.S.C. § 392(a)(5), to which Counsel to the President Lloyd Cutler's letter of April 9, 1980, refers, is relevant. The Olympic Games are not conducted under the auspices of the national governing bodies and need not meet the requirements of § 202(b), 39 U.S.C. § 392(b).

No provision of the Amateur Sports Act of 1978 expressly precludes the USOC's making a decision not to participate in any particular Olympic Games. Nor does any provision of that Act, by implication, preclude the USOC's making such a decision. Indeed, I believe that the 1978 Act should be read to assume congressional awareness that under the rules of the International Olympic Committee (IOC), national Olympic committees established by countries to represent them on the IOC could decide not to participate in any particular Olympic Games. For example, in 1976 numerous African nations through their respective Olympic bodies declined to send teams to or withdrew teams from the Summer Games in Montreal. Congress may be charged, I believe, with enacting the 1978 Act with that recent history in mind. In addition, there is no sanction if a delegation withdraws before "final entries" have been made.[4] Moreover, the current IOC bylaws state that national Olympic committees such as the USOC—

> shall organize and supervise their country's representation at the Olympic Games. Representation covers the decision to participate . . . .[5]

Given that § 105(a)(2) of the Amateur Sports Act of 1978, 36 U.S.C. § 375(a)(2), establishes the power of the USOC to "represent the United States as its national Olympic committee in relations with the International Olympic Committee," I believe that Congress intended in enacting that Act that the USOC would be empowered to decide not to participate in any particular Olympic Games.

Under my analysis above, I believe the argument that the 1978 Act created substantive legal rights in individual athletes to participate in any particular Olympic Games may be disposed of summarily. Under § 114 of the Act, 36 U.S.C. § 382(b), the USOC "shall establish and maintain provisions for the swift and equitable resolution of disputes involving any of its members *and* relating to the opportunity of an amateur athlete . . . to participate in the Olympic Games . . . ." (Emphasis added.) Although it might be argued that Art. IX, § 1 of the USOC Constitution,[6] read literally, suggests the existence of a right of individual athletes to participate in particular Olympic Games "if selected," the language of § 114 and its legislative history contradict the suggestion that this "right" was to be viewed as a substantive restriction on the USOC's power to make the participation decision. Thus, while the report issued by the Senate committee recognized a "right to take part in the Olympic Games," the context in which that "right" was described demonstrates that Congress' concern in § 114 was to prevent athletes from being "used as pawns by one organization to gain advantage over another." S. Rep. No. 770, 95th Cong., 2d Sess. 6 (1978).[7] See also H.R. Rep. No. 1627, 95th Cong., 2d Sess. 15 (1978).

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[2] Under § 105(a)(3), 36 U.S.C. § 375 (a)(3), the USOC is empowered to "organize, finance, and control the representation of the United States in the competitions and events of the Olympic Games. . . ."

[3] 36 U.S.C. § 378.

[4] Rule 25 of the Rules of the International Olympic Committee (1979) (IOC Rule). Although "final entries" is not defined, it appears to refer to the entry form containing the names and numbers of competitors which must be submitted to the Organizing Committee of the Olympic Games no later than 10 days before the relevant Olympic competitions begin. IOC Rule 36, ¶ 4; Bylaw V, ¶ 8 to IOC Rule 24.

[5] Bylaw V, ¶ 7, to IOC Rule 24.

In view of the historical understanding and practice regarding the power of national Olympic committees to make participation decisions, and given that no provision of the Amateur Sports Act of 1978 expressly or implicitly qualified that understanding, I do not believe that a tenable argument can be made that the USOC is required by law to send an American team to the Moscow Games. In reaching this conclusion, I do not mean to suggest that Congress could not, by statute, accomplish that end or otherwise dictate the course the USOC is to follow in this matter. I merely conclude that in enacting the 1978 Act, Congress implicitly recognized the preexisting understanding that the USOC, as our country's national Olympic committee, would have the power to make a decision whether to participate in particular Olympic Games.

Sincerely,
BENJAMIN R. CIVILETTI

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[6] No member of the USOC may deny or threaten to deny any amateur athlete the opportunity to compete in the Olympic Games, the Pan-American Games, a world championship competition, or other such protected competition as defined in Article I, § 2(g); nor may any member, subsequent to such competition, censure, or otherwise penalize, (a) any such athlete who participates in such competition, or (b) any organization which the athlete represents. The USOC shall, by all lawful means at its disposal, protect the right of an amateur athlete to participate if selected (or to attempt to qualify for selection to participate) as an athlete representing the United States in any of the aforesaid competitions.

[7] Even if § 114 were viewed as granting a substantive right to "selected" athletes to participate in any particular Olympic Games, the legislative history of that provision indicates that the right conferred would be limited to protection from "an arbitrary rule which, in its application, restricts, for no real purpose, an athlete's opportunity to compete." S. Rep. No. 770, at 6.

# Litigation Responsibility of the Attorney General in Cases in the International Court of Justice

**Under 28 U.S.C. §§ 516 and 519, the conduct of litigation in which the United States is a party is reserved to the Attorney General, except as otherwise authorized by law; under 5 U.S.C. § 3106, other agencies shall not conduct litigation, but shall refer the matter to the Department of Justice.**

**The Attorney General's authority and responsibility to conduct litigation extends to litigation in foreign courts, including litigation affecting foreign relations of the United States, and litigated proceedings before the International Court of Justice are thus within his supervisory power.**

**[The text of this opinion appears in the section of this volume dealing with the Iranian Hostage Crisis, at p. 233 *infra.*]**

# Authority of the Chrysler Corporation Loan Guarantee Board to Issue Guarantees

**The Chrysler Corporation Loan Guarantee Board has the authority, under § 4(a) of the Chrysler Corporation Loan Guarantee Act, 15 U.S.C. § 1863(a), to issue loan guarantees even though Congress has not appropriated funds in advance to make payments under the guarantees in the event of a default.**

**The Attorney General concurs in the Comptroller General's opinion (Comp. Op. File B-197380 (April 10, 1980)) that the Board has the authority until December 31, 1983, to issue loan guarantees in the amount up to $1.5 billion of contingent liability for loan principal outstanding at any one time and additional amounts for loan interest.**

April 23, 1980

THE SECRETARY OF THE TREASURY

MY DEAR MR. SECRETARY: This is in response to your letter of April 16, 1980, requesting my opinion on the authority of the Chrysler Corporation Loan Guarantee Board, of which you are chairman, to issue guarantees under the Chrysler Corporation Loan Guarantee Act of 1979 (Act), 15 U.S.C. § 1861 *et seq.* You ask whether the Board may issue guarantees even though Congress has not appropriated funds in advance to make payments under the guarantees in the event of a default. You also enclosed an opinion of the Comptroller General, construing the Chrysler guarantee appropriation act, and asked me to indicate whether I concur in his conclusions.

Section 4(a) of the Act, 15 U.S.C. § 1863(a), authorizes the Board to guarantee the payment of principal and interest on loans to Chrysler Corporation. Under § 8(a) of the Act, 15 U.S.C. § 1867(a), loan guarantees extended by the Board may not at any one time exceed $1.5 billion in the aggregate principal amount outstanding. The Board's guarantee authority is further limited by § 15(b) of the Act, 15 U.S.C. § 1874(b), which provides:

> Notwithstanding any other provision of this Act, the authority of the Board to make any loan guarantee under this Act shall be limited to the extent such amounts are provided in advance in appropriation acts.

Almost contemporaneously with the passage of the Act,[1] Congress enacted an appropriation act providing:

> That the following sum is appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 1980:
>
> DEPARTMENT OF THE TREASURY
> BUREAU OF GOVERNMENT FINANCIAL OPERATIONS
> CHRYSLER CORPORATION LOAN GUARANTEE PROGRAM
>
> For necessary administrative expenses as authorized by the Chrysler Corporation Loan Guarantee Act of 1979, $1,518,000. Total loan commitments and loan guarantees may be extended in the amount of $1,500,000,000 of contingent liability for loan principal and for such additional sums as may be necessary for interest payments, and commitment is hereby made to make such appropriations as may become necessary to carry out such loan guarantees.

P.L. No. 96–183, 93 Stat. 1319 (1980). The question presented here is whether the appropriation-in-advance condition in § 15(b) of the Act is satisfied by the appropriation act.

Chrysler's prospective underwriters have questioned whether § 15(b)'s condition that amounts be provided in advance in appropriation acts could be construed to require that *funds* be appropriated in advance to make payments under the guarantees in the event of a default, a condition that is not satisfied by the appropriation act. Such a construction is supported by Congress' use of words in § 15(b)—"Limited to the extent such amounts are provided in advance in appropriation acts"—which are almost identical to those in § 401(a) of the Congressional Budget Act of 1974, 31 U.S.C. 1351(a); § 401(a) requires that bills providing "new spending authority" contain provisions limiting such authority "to such extent or in such amounts as are provided in appropriation acts." [2] The legislative history of that Act reveals that § 401(a) was intended to require the appropriation of *funds*.[3] Nonetheless, I conclude on the basis of strong countervailing evidence in the legislative history of the Chrysler Corporation Loan Guarantee Act that § 15(b) was not intended to require the appropriation of funds, but rather Congress' approval through the appropriations process of the amount of loans that may be guaranteed by the Board.

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[1] The Chrysler Corporation Loan Guarantee Act was enacted on January 7, 1980; the appropriation act, P.L. No. 96–183, 93 Stat. 1319 (1980), was enacted January 2, 1980.

[2] Section 401(a) is not controlling here because it expressly exempts contracts of guarantees from its coverage, but the similarity in the language could be viewed as an indication that the statutes be construed *pari passu*. *Cf. Northcross* v. *Memphis Board of Education*, 412 U.S. 427, 428 (1973).

[3] The House Report states:

> The bill [Congressional Budget Act of 1974] incorporates backdoor spending into the Congressional budget process. Under new procedures, backdoor spending (such as contract authority, loan authority, and mandatory or open-ended entitlements) could not take effect *until funds were provided* through the appropriations process.

H. Rep. No. 93–658, 93rd Cong., 1st Sess. 17, *reprinted in* [1974] U.S. Code Cong. & Ad. News 3462, 3463 (emphasis supplied).

The Senate version of § 15(b) reported by the Senate Committee on Banking, Housing and Urban Affairs provided:

> Notwithstanding any other provisions of this Act, commitments to guarantee loans under the Act shall not exceed such limitations on such commitments as are provided in general provisions of appropriation acts.

125 Cong. Rec. S19019 (daily ed. December 18, 1979). The Senate Report explains the intent of the provision:

> The intent of this language is to require that the limitations on loan guarantee authority under this Act be approved in appropriation Acts without making any implication that this action should be construed as conferring budget authority.

S. Rep. No. 93-463, 96th Cong., 1st Sess. 39 (1979).

Section 15(b) was later amended on the floor of the Senate at the request of Senator Proxmire, the chairman of the Senate Committee on Banking, Housing and Urban Affairs, to conform to the provision in the House bill. Explaining that the Senate Appropriations Committee's staff had requested the amendment, Senator Proxmire revealed that the staff was concerned that the Senate version of § 15(b) could be construed to permit the issuance of guarantees without first obtaining approval through the appropriation process:

> It certainly was the intention of the Banking Committee not to go around the Appropriations Committee and not to move into their jurisdiction or provide that there would be a commitment or a guarantee before the Appropriations Committee had an opportunity to pass on it. All this [amendment] does as I say, is to make it conform to our intention, make it conform also to the language in the House bill.

125 Cong. Rec. S19018 (daily ed. December 18, 1979) (remarks of Senator Proxmire).

Urging the adoption of the amendment, Senator Proxmire stated:

> This is not a substantive amendment, and I am sure the Senator [Riegle] will agree when he looks at it. It certainly is in the form of a technical correction. It does not change in any way the intention which was indicated by

> the committee and, as I say, it is the same as the House language.

*Id.* at S19019.

It is clear from Senator Proxmire's remarks and the Senate Report that the purpose of § 15(b) was to ensure that no guarantees would be issued without first obtaining the approval of Congress through the appropriation process of the total amount that could be guaranteed.[4] This approval was obtained upon the passage of the appropriation act which permitted the Board to issue the full amount of guarantees authorized under the Act.[5]

For the above reasons, I conclude that the Board is empowered pursuant to § 15(b) of the Chrysler Corporation Loan Guarantee Act and P.L. No. 96–183 to issue guarantees even though Congress has not appropriated funds in advance to make payments under the guarantees in the event of a default. I also fully concur in the Comptroller General's opinion including his conclusion that the Board has the authority until December 31, 1983, to issue loan guarantees in the amount up to $1.5 billion of contingent liability for loan principal outstanding at any one time and additional amounts for loan interest. Comp. Op., File B-197380 (April 10, 1980).

Sincerely,
BENJAMIN R. CIVILETTI

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[4] Senator Muskie, chairman of the Senate Budget Committee, also indicated on the floor of the Senate that under the Act Congress could choose in the appropriation process to limit the level of guarantees rather than appropriate funds to cover possible future defaults. *See* 125 Cong. Rec. S19188 (daily ed. December 19, 1979). Because the guarantees would represent a contingent liability rather than a current outlay, he urged the Senate to choose the former during the appropriation process to avoid including the $1.5 billion guarantee authority in the current budget. *Id.*

[5] Confirming that such approval was sufficient to satisfy the condition of § 15(b), the House Report accompanying the appropriation act stated:

> This urgent appropriation bill provides the necessary authority for the Federal Government to enter into guaranteed loan agreements in an amount not to exceed $1.5 billion for the loan principal.

H. Rep. No. 96–719, 96th Cong., 1st Sess. 1 (1979).

## Applicability of the Antideficiency Act Upon a Lapse in an Agency's Appropriation

**If, after the expiration of an agency's appropriation, Congress has not enacted an appropriation for the immediately subsequent period, the agency may obligate no further funds except as necessary to bring about the orderly termination of its functions, and the obligation or expenditure of funds for any purpose not otherwise authorized by law would be a violation of the Antideficiency Act.**

**The manifest purpose of the Antideficiency Act is to insure that Congress will determine for what purpose the government's money is to be spent and how much for each purpose.**

**Because no statute generally permits federal agencies to incur obligations without appropriations for the pay of employees, agencies are not, in general, authorized to employ the services of their employees upon a lapse in appropriations.**

April 25, 1980

THE PRESIDENT

MY DEAR MR. PRESIDENT: You have requested my opinion whether an agency can lawfully permit its employees to continue work after the expiration of the agency's appropriation for the prior fiscal year and prior to any appropriation for the current fiscal year. The Comptroller General, in a March 3, 1980, opinion, concluded that, under the so-called Antideficiency Act, 31 U.S.C. § 665(a), any supervisory officer or employee, including the head of an agency, who directs or permits agency employees to work during any period for which Congress has not enacted an appropriation for the pay of those employees, violates the Antideficiency Act. Notwithstanding that conclusion, the Comptroller General also took the position that Congress, in enacting the Antideficiency Act, did not intend federal agencies to be closed during periods of lapsed appropriations. In my view, these conclusions are inconsistent. It is my opinion that, during periods of "lapsed appropriations," no funds may be expended except as necessary to bring about the orderly termination of an agency's functions, and that the obligation or expenditure of funds for any purpose not otherwise authorized by law would be a violation of the Antideficiency Act.

Section 665(a) of Title 31 forbids any officer or employee of the United States to:

> Involve the Government in any contract or other obligation, for the payment of money for any purpose, in

> advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.

Because no statute permits federal agencies to incur obligations to pay employees without an appropriation for that purpose, the "authorized by law" exception to the otherwise blanket prohibition of § 665(a) would not apply to such obligations.[1] On its face, the plain and unambiguous language of the Antideficiency Act prohibits an agency from incurring pay obligations once its authority to expend appropriations lapses.

The legislative history of the Antideficiency Act is fully consistent with its language. Since Congress, in 1870, first enacted a statutory prohibition against agencies incurring obligations in excess of appropriations, it has amended the Antideficiency Act seven times.[2] On each occasion, it has left the original prohibition untouched or reenacted the prohibition in substantially the same language. With each amendment, Congress has tried more effectively to prohibit deficiency spending by requiring, and then requiring more stringently, that agencies apportion their spending throughout the fiscal year. Significantly, although Congress, from 1905 to 1950, permitted agency heads to waive their agencies' apportionments administratively, Congress never permitted an administrative waiver of the prohibition against incurring obligations in excess or advance of appropriations. Nothing in the debates concerning any of the amendments to or reenactments of the original prohibition has ever suggested an implicit exception to its terms.[3]

The apparent mandate of the Antideficiency Act notwithstanding, at least some federal agencies, on seven occasions during the last 30 years, have faced a period of lapsed appropriations. Three such lapses occurred in 1952, 1954, and 1956.[4] On two of these occasions, Congress subsequently enacted provisions ratifying interim obligations incurred during the lapse.[5] However, the legislative history of these provisions does not explain Congress' understanding of the effect of the Antideficiency Act on the agencies that lacked timely appropriations.[6] Neither are we aware that the Executive Branch formally addressed the Antideficiency Act problem on any of these occasions.

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[1] An example of a statute that would permit the incurring of obligations in excess of appropriations is 41 U.S.C. § 11, permitting such contracts for "clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies" for the Armed Forces. *See* 15 Op. Att'y Gen. 209. *See also* 25 U.S.C § 99 and 31 U.S.C. § 668.

[2] Act of March 3, 1905, ch. 1484, § 4, 33 Stat. 1257; Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 48; Act of Sept. 6, 1950, ch. 896, § 1211, 64 Stat. 765; Pub. L. 85-170, § 1401, 71 Stat. 440 (1957); Pub. L. 93-198, § 421, 87 Stat. 789 (1973); Pub. L. 93-344, § 1002, 88 Stat. 332 (1974); Pub. L. 93-618, § 175(a)(2), 88 Stat. 2011 (1975).

[3] The prohibition against incurring obligations in excess of appropriations was enacted in 1870, amended slightly in 1905 and 1906, and reenacted in its modern version in 1950. The relevant legislative debates occur at Cong. Globe, 41st Cong., 2d Sess. 1553, 3331 (1870); 39 Cong. Rec. 3687-692, 3780-783 (1905); 40 Cong. Rec. 1272-298, 1623-624 (1906); 96 Cong. Rec. 6725-731, 6835-837, 11369-370 (1950).

[4] In 1954 and 1956, Congress enacted temporary appropriations measures later than July 1, the start of fiscal years 1955 and 1957. Act of July 6, 1954, ch. 460, 68 Stat. 448; Act of July 3, 1956, ch. 516, 70 Stat. 496. In 1952, Congress enacted, two weeks late, supplemental appropriations for fiscal year 1953 without having previously enacted a temporary appropriations measure. Act of July 15, 1952, ch. 758, 66 Stat. 637.

[5] Act of July 15, 1952, ch. 758, § 1414, 66 Stat. 661; Act of Aug. 26, 1954, ch. 935, § 1313, 68 Stat. 831.

The four more recent lapses include each of the last four fiscal years, from fiscal year 1977 to fiscal year 1980. Since Congress adopted a fiscal year calendar running from October 1 to September 30 of the following year, it has never enacted continuing appropriations for all agencies on or before October 1 of the new fiscal year.[7] Various agencies of the Executive Branch and the General Accounting Office have internally considered the resulting problems within the context of their budgeting and accounting functions. Your request for my opinion, however, apparently represents the first instance in which this Department has been asked formally to address the problem as a matter of law.

I understand that, for the last several years, the Office of Management and Budget (OMB) and the General Accounting Office (GAO) have adopted essentially similar approaches to the administrative problems posed by the Antideficiency Act. During lapses in appropriations during this Administration, OMB has advised affected agencies that they may not incur any "controllable obligations" or make expenditures against appropriations for the following fiscal year until such appropriations are enacted by Congress. Agencies have thus been advised to avoid hiring, grantmaking, nonemergency travel, and other nonessential obligations.

When the General Accounting Office suffered a lapse in its own appropriations last October, the Director of General Services and Controller issued a memorandum, referred to in the Comptroller General's opinion,[8] indicating that GAO would need "to restrain our FY 1980 obligations to only those essential to maintain day-to-day operations." Employees could continue to work, however, because of the Director's determination that it was not "the intent of Congress that GAO close down."

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[6] In 1952, no temporary appropriations were enacted for fiscal year 1953. The supplemental appropriations measure enacted on July 15, 1952 did, however, include a provision ratifying obligations incurred on or since July 1, 1952. Act of July 15, 1952, ch. 758, § 1414, 66 Stat. 661. The ratification was included, without elaboration, in the House Committee-reported bill, H. Rep. No. 2316, 82d Cong., 2d Sess. 69 (1952), and was not debated on the floor.

In 1954, a temporary appropriations measure for fiscal year 1955 was presented to the President on July 2 and signed on July 6. Act of July 6, 1954, ch. 460, 68 Stat. 448. The Senate Committee on Appropriations subsequently introduced a floor amendment to the eventual supplemental appropriations measure that ratified obligations incurred on or after July 1, 1954, and was accepted without debate. Act of Aug. 26, 1954, ch. 935, § 1313, 68 Stat. 831. 100 Cong. Rec. 13065 (1954).

In 1956, Congress' temporary appropriations measure was passed on July 2 and approved on July 3. Act of July 3, 1956, ch. 516, 70 Stat. 496. No ratification measure for post-July 1 obligations was enacted.

[7] Pub. L. 94-473, 90 Stat. 2065 (Oct. 11, 1976); Pub. L. 95-130, 91 Stat. 1153 (Oct. 13, 1977); Pub. L. 95-482, 92 Stat. 1603 (Oct. 18, 1978); Pub. L. 96-86, 93 Stat. 656 (Oct. 12, 1979).

[8] The entire memorandum appears at 125 Cong. Rec. S13784 (daily ed. Oct. 1, 1979) [remarks of Sen. Magnuson].

In my view, these approaches are legally insupportable. My judgment is based chiefly on three considerations.

First, as a matter of logic, any "rule of thumb" excepting employee pay obligations from the Antideficiency Act would have to rest on a conclusion, like that of the Comptroller General, that such obligations are unlawful, but also authorized. I believe, however, that legal authority for continued operations either exists or it does not. If an agency may infer, as a matter of law, that Congress has authorized it to operate in the absence of appropriations, then in permitting the agency to operate, the agency's supervisory personnel cannot be deemed to violate the Antideficiency Act. Conversely, if the Antideficiency Act makes it unlawful for federal agencies to permit their employees to work during periods of lapsed appropriations, then no legislative authority to keep agencies open in such cases can be inferred, at least from the Antideficiency Act.

Second, as I have already stated, there is nothing in the language of the Antideficiency Act or in its long history from which any exception to its terms during a period of lapsed appropriations may be inferred. Faithful execution of the laws cannot rest on mere speculation that Congress does not want the Executive Branch to carry out Congress' unambiguous mandates.

It has been suggested, in this regard, that legislative intent may be inferred from Congress' practice in each of the last four years of eventually ratifying obligations incurred during periods of lapsed appropriations if otherwise consistent with the eventual appropriations.[9] Putting aside the obvious difficulty of inferring legal authority from expectations as to Congress' future acts, it appears to me that Congress' practice suggests an understanding of the Antideficiency Act consistent with the interpretation I have outlined. If legal authority exists for an agency to incur obligations during periods of lapsed appropriations, Congress would not need to confirm or ratify such obligations. Ratification is not necessary to protect private parties who deal with the government. So long as Congress has waived sovereign immunity with respect to damage claims in contract, 28 U.S.C. §§ 1346, 1491, the *apparent* authority alone of government officers to incur agency obligations would likely be sufficient to create obligations that private parties could enforce in court. The effect of the ratifying provisions seems thus to be limited to providing *legal* authority where there was none before, implying Congress' understanding that agencies are not otherwise empowered to incur obligations in advance of appropriations.

Third, and of equal importance, any implied exception to the plain mandate of the Antideficiency Act would have to rest on a rationale that would undermine the statute. The manifest purpose of the

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[9] Pub. L. 94-473, § 108, 90 Stat. 2066 (1976); Pub. L. 95-130, § 108, 91 Stat. 1154 (1977); Pub. L. 95-482, § 108, 92 Stat. 1605 (1978); Pub. L. 96-86, § 117, 93 Stat. 662 (1979).

Antideficiency Act is to insure that Congress will determine for what purposes the government's money is to be spent and how much for each purpose. This goal is so elementary to a proper distribution of governmental powers that when the original statutory prohibition against obligations in excess of appropriations was introduced in 1870, the only responsive comment on the floor of the House was, "I believe that is the law of the land now." Cong. Globe, 41st Cong., 2d Sess. 1553 (1870) (remarks of Rep. Dawes).

Having interpreted the Antideficiency Act, I would like to outline briefly the legal ramifications of my interpretation. It follows first of all that, on a lapse in appropriations, federal agencies may incur no obligations that cannot lawfully be funded from prior appropriations unless such obligations are otherwise authorized by law. There are no exceptions to this rule under current law, even where obligations incurred earlier would avoid greater costs to the agencies should appropriations later be enacted.[10]

Second, the Department of Justice will take actions to enforce the criminal provisions of the Act in appropriate cases in the future when violations of the Antideficiency Act are alleged. This does not mean that departments and agencies, upon a lapse in appropriations, will be unable logistically to terminate functions in an orderly way. Because it would be impossible in fact for agency heads to terminate all agency functions without incurring any obligations whatsoever in advance of appropriations, and because statutes that impose duties on government officers implicitly authorize those steps necessary and proper for the performance of those duties, authority may be inferred from the Antideficiency Act itself for federal officers to incur those minimal obligations necessary to closing their agencies. Such limited obligations would fall within the "authorized by law" exception to the terms of § 665(a).

This Department will not undertake investigations and prosecutions of officials who, in the past, may have kept their agencies open in advance of appropriations. Because of the uncertainty among budget and accounting officers as to the proper interpretation of the Act and Congress' subsequent ratifications of past obligations incurred during periods of lapsed appropriations, criminal sanctions would be inappropriate for those actions.

Respectfully,

**BENJAMIN R. CIVILETTI**

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[10] *See* 21 Op. Att'y Gen. 288.

# Constitutionality of Congress' Disapproval of Agency Regulations by Resolutions Not Presented to the President

**Section 431 of the General Education Provisions Act, 20 U.S.C. § 1232(d), which purports to authorize Congress, by concurrent resolutions that are not to be presented to the President for his approval or veto, to disapprove Department of Education regulations for education programs it administers, is unconstitutional.**

**Legislative veto devices deny the President his power under Article I, § 7 of the Constitution, to veto legislation, interfere with his duty under Article II, § 3, faithfully to execute the laws, and arrogate to Congress power to interpret existing law that is constitutionally reserved to the judicial branch.**

**The congressional disapproval provisions of the General Education Provisions Act, 20 U.S.C. § 1232(d), are severable from the substantive rulemaking authorities conferred by the Education Amendments of 1978, P.L. No. 95-561, 92 Stat. 2143.**

**The Attorney General must scrutinize with caution any claim that he or any executive officer may decline to defend or enforce a statute whose constitutionality is merely in doubt. At the same time, the Executive is required to enforce the Constitution and to preserve the integrity of its functions against unconstitutional encroachments.**

June 5, 1980

THE SECRETARY OF EDUCATION

MY DEAR MADAM SECRETARY: I am responding to your request for my opinion regarding the constitutionality of § 431 of the General Education Provisions Act (GEPA), 20 U.S.C. § 1232(d). That provision purports to authorize Congress, by concurrent resolutions that are not to be submitted to the President for his approval or veto, to disapprove final regulations promulgated by you for education programs administered by the Department of Education. Acting under this authority, Congress has recently disapproved regulations concerning four programs of your Department.[1] For reasons set forth below, I believe that

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[1] H. Con. Res. 318, 96th Cong., 2d Sess. (1980), disapproves regulations issued under § 451 of the GEPA, 20 U.S.C. § 1234, pertaining to the operations of the Education Appeal Board. 45 Fed. Reg. 22,634 (1980). H. Con. Res. 319, 96th Cong., 2d Sess. (1980), disapproves regulations issued under § 322 of the Elementary and Secondary Education Act of 1965 [ESEA], 20 U.S.C. § 2962, pertaining to arts education. 45 Fed. Reg. 22,742 (1980). H. Con. Res. 332, 96th Cong., 2d Sess. (1980), disapproves regulations issued under §§ 346–48 of the ESEA, 20 U.S.C. §§ 3001–03, pertaining to law-related education. 45 Fed. Reg. 27,880 (1980). S. Con. Res. 91, 96th Cong., 2d Sess. (1980), disapproves regulations issued under Title IV of the ESEA, 20 U.S.C. §§ 3081 *et seq.*, pertaining to grants to state and local education agencies for educational resources. 45 Fed. Reg. 23,602 (1980). The statutory authority for issuance of these regulations was added to the GEPA or the ESEA by the Education Amendments of 1978, Pub. L. No. 95-561, 92 Stat. 2143.

§ 431 is unconstitutional and that you are entitled to implement the regulations in question in spite of Congress' disapproval.

## I.

Under 20 U.S.C. § 1232(d), your Department is required, when it promulgates any final regulation for an "applicable program,"[2] to transmit that regulation to the Speaker of the House and to the President of the Senate. This section further provides:

> Such final regulation shall become effective not less than forty-five days after such transmission unless the Congress shall, by concurrent resolution, find that the final regulation is inconsistent with the Act from which it derives its authority, and disapprove such final regulation.

In short, the two Houses of Congress can, without presidential participation, prevent the Executive from executing substantive law previously enacted by the Congress with respect to education programs. Moreover, § 1232(d), on its face, purports to delegate to the two Houses of Congress the constitutional function historically reserved to the courts to ensure that the execution of the law by the Executive is consistent with the statutory bounds established in the legislative process.

In designing a federal government of limited powers, the Framers of the Constitution were careful to assign the powers of government to three separate, but coordinate branches. They vested legislative power in the Congress, the power to execute the laws passed by the Congress in the Executive, and the power finally to say what the law is in the Judiciary. In ordering these relationships, the Framers were careful, in turn, to limit each branch in the exercise of its powers. The power of Congress to legislate was not left unrestrained, but was made subject to the President's veto. Neither was the President's power to execute the law left absolute, but Congress was empowered to constrain any executive action not committed by the Constitution exclusively to the Executive by passing legislation on that subject. Should such legislation be vetoed by the President, Congress could use its ultimate authority to override the President's veto. Both of the political branches were, in turn, to be checked by the courts' power to take jurisdiction to determine the existence of legislative authority for executive actions, and to review the acts of both Congress and the Executive for constitutionality. This, in simplest form, is our carefully balanced constitutional system.

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[2] Under the GEPA, an "applicable program" is "any program for which an administrative head of an education agency has administrative responsibility as provided by law or by delegation or authority pursuant to law." 20 U.S.C. § 1221(b) and (c)(1)(A). Two departmental regulations recently disapproved by Congress were promulgated originally by the Commissioner of Education, under the former Department of Health, Education, and Welfare. The Commissioner's functions, however, were transferred to you under the Department of Education Organization Act, § 301(a)(1), Pub. L. No. 96-88, 93 Stat. 677 (1979). All four programs involved are now administered under your authority.

The legislative veto mechanism in § 1232(d) upsets the careful balance devised by the Framers. Viewed as "legislative" acts, legislative vetoes authorize congressional action that has the effect of legislation but deny to the President the opportunity to exercise his veto power under Article I, § 7 of the Constitution. Viewed as interpretive or executive acts, legislative vetoes give Congress an extra-legislative role in administering substantive statutory programs that impinges on the President's constitutional duty under Article II, § 3, of the Constitution faithfully to execute the laws. Viewed as acts of quasi-judicial interpretation of existing law, legislative vetoes arrogate to the Congress power reserved in our constitutional system for the nonpolitical judicial branch. Thus, however they may be characterized, legislative vetoes are unconstitutional.

### *A. The Presentation Clauses*

As illustrated by the four recent exercises of legislative veto power under § 1232(d), legislative veto devices are functionally equivalent to legislation because they permit Congress, one of its Houses, or even, on occasion, one or two of its committees, to block the execution of the law by the Executive for any reason, or indeed, for no reason at all. Under § 1232(d), the two Houses of Congress could, by passing successive concurrent resolutions, bring to a halt substantive programs, the authority for which was enacted by prior Congresses with the participation of the President. Such legislative veto devices cannot stand in the face of the language and history of the Presentation Clauses, Art. I, § 7, cls. 2 and 3.

Clause 2 provides that every bill that passes the House and the Senate shall, before it becomes law, be presented to the President for his approval or disapproval.[3] If disapproved, a bill does not become law unless repassed by a two-thirds vote of each House.

At the Philadelphia Convention of 1787, the Framers considered and explicitly provided for the possibility that Congress, by passing "resolutions" rather than bills, might attempt to evade the requirement that proposed legislation be presented to the President. During the debate on Article I, § 7, James Madison observed:

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[3] Clause 2 provides, in pertinent part:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.

> If the negative of the President was confined to *bills*; it would be evaded by acts under the form and name of Resolutions, votes &c—[and he] proposed that "or resolve" should be added after "*bill*" . . . , with an exception as to votes of adjournment &c.

2 M. Farrand, *Records of the Federal Convention of 1787* 301 (rev. ed. 1937).

Madison's notes indicate that "after a short and rather confused conversation on this subject," his proposal was at first rejected. However, at the commencement of the following day's session, Mr. Randolph, "having thrown into a new form" Madison's proposal, renewed it. It passed by vote of 9–1. *Id.*, 301–35. Thus, the Constitution today provides, in addition to Clause 2 of § 7 dealing with the passage of "bills," an entirely separate clause, Article I, § 7, cl. 3, as follows:

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed by the Case of a Bill.

I believe it is manifest, from the wording of Clause 3 and the history of its inclusion in the Constitution as a separate clause apart from the clause dealing with "bills," that its purpose is to protect against *all* congressional attempts to evade the President's veto power.[4] The function of the Congress in our constitutional system is to enact laws, and all final congressional action of public effect, whether or not it is formally referred to as a bill, resolution, order or vote, must follow the procedures prescribed in Article I, § 7, including presentation to the President for his approval or veto.

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[4] The President was given his veto power, in part, in order that he might resist any encroachment on the integrity of the executive branch. *See The Federalist*, No. 48. His participation in the approval of legislation is also crucial because of his unique constitutional status as representative of all the people. As Chief Justice Taft stated in 1926:

> The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than the members of either body of the Legislature. . . .

*Myers* v. *United States*, 272 U.S. 52, 123 (1926).

### *B. The Separation of Powers*

#### 1. Executing the law

The principle of separation of powers underlying the structure of our constitutional form of government generally provides for the separation of powers among the legislative, executive, and judicial branches, and provides for "checks and balances" to maintain the integrity of each of the three branches' functions. Generally speaking, the separation of powers provides that each of the three branches must restrict itself to its allocated sphere of activity: legislating, executing the law, or interpreting the law with finality. This is not to say that every governmental function is inherently and of its very nature either legislative, executive, or judicial. Some activity might be performed by any of the three branches—and in that situation it is up to Congress to allocate the responsibility. *See, e.g., Wayman* v. *Southard,* 10 Wheat. 1, 42–43, 46 (1825) (Chief Justice Marshall). Once Congress, by passing a law, has performed that function of allocating responsibility, however, the separation of powers requires that Congress cannot control the discharge of those functions assigned to the Executive or the Judiciary, except through the plenary legislative process of amendment and repeal.

The underlying reason, well stated by James Madison, is that otherwise the concentration of executive and legislative power in the hands of one branch might "justly be pronounced the very definition of tyranny." *The Federalist,* No. 47, at 324 (Cooke ed. 1961). The shifting of executive power to the legislative branch which would be occasioned by these legislative veto devices is, I believe, undeniable; the concentration of this blended power is precisely what the Framers feared and what they set about to prevent.

The Constitution's overall allocations of power may not be altered under the guise of an assertion by the Congress of its power to pass laws that are "necessary and proper for carrying into Execution . . . Powers vested by [the] Constitution in the Government of the United States, or in any Department or Officer thereof," Art. I, § 8, cl. 18.[5] As the Supreme Court made clear in *Buckley* v. *Valeo,* 424 U.S. 1 (1976), the exercise of power by Congress pursuant to the Necessary and Proper Clause is limited both by other express provisions of the Constitution and by the principles of separation of powers.

In *Buckley,* it was argued that officers of the Congress could, under the Necessary and Proper Clause, appoint commissioners of the Federal

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[5] It is fundamental to our concept of limited federal government that power exercised by the legislative, executive and judicial branches be traced to a provision of the Constitution or to a statute which is expressly or impliedly authorized by a provision of the Constitution. Thus, a source of authority for Congress to exercise power under legislative veto devices must be found in the Constitution in order for that authority to be recognized as legitimate. As we demonstrate below, the Necessary and Proper Clause does not grant such authority; nor does any other provision of the Constitution.

Election Commission, notwithstanding the fact that Article II, § 2, clause 2 of the Constitution placed the appointment power in the President. With regard to the relationship between the exercise of power under the Necessary and Proper Clause and other provisions of the Constitution, the Court stated the rule as follows:

> Congress could not, merely because it concluded that such a measure was "necessary and proper" to the discharge of its substantive legislative authority, pass a bill of attainder or *ex post facto* law contrary to the prohibitions contained in section 9 of Art. I. No more may it vest in itself, or in its officers, the authority to appoint officers of the United States when the Appointments Clause by clear implication prohibits it from doing so.

424 U.S. at 135.

The Constitution establishes the President's veto power as clearly as it establishes the appointment power or prohibits bills of attainder and *ex post facto* laws. Under *Buckley,* the only reasonable implication of the Framers' inclusion of Article I, § 7, clause 3 in the Constitution is that the Necessary and Proper Clause is not a source of power for evasion of these specific limitations through the enactment of legislative veto devices. I would add that, in reaching its holding in *Buckley,* the Court considered and relied upon earlier cases that seem most relevant to the constitutionality of legislative veto devices. In quoting from *Myers* v. *United States,* 272 U.S. 52 (1926), the Court recognized the relationship between the grant of executive power to the President and the issue before it. 424 U.S. at 135-136.[6] I believe that *Buckley* and the cases relied on by the *Buckley* Court foreclose arguments that the Necessary and Proper Clause grants Congress the power to provide for legislative veto devices.

Because to characterize the power exercised by the two Houses under § 1232(d) as "legislation" would necessarily require Congress to respect the President's veto power by presenting its resolutions for his approval, it is necessary for proponents of such power to deny that the power is "legislation" in the constitutional sense. They argue instead that the device is a means for Congress to oversee the execution of the law by the Executive, in aid of undoubted constitutional powers to pass legislation and appropriations. Such an argument, however, cannot withstand scrutiny. Without a legislative veto, the regulations of your Department, unless invalidated by a court, would have the force of law. In depriving them of that force, the necessary effect of a legislative veto is to block further execution of a statutory program until the Executive promulgates further regulations in compliance with the current views of a Congress that may well be different from the Congress that enacted the substantive law.[7] The difference between this kind of congressional "oversight" and the legitimate oversight powers of Congress in their effect on the constitutional allocation of powers could not be more profound. By its nature, for example, the exercise of a legislative veto would be beyond judicial review because the exercise of such powers could be held to no enforceable standards. In exercising its veto, I believe it clear that Congress is dictating its interpretation of the permissible bounds for execution of an existing law; a result that can be accomplished only by legislation.

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[6] The Court went on, in holding the appointment of Federal Election Commission members by officers of Congress to be unconstitutional, to quote the following language from its earlier decision in *Springer* v. *Philippine Islands,* 227 U.S. 189, 202 (1928):

> Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions. It is unnecessary to enlarge further upon the general subject, since it has so recently received the full consideration of this court. *Myers* v. *United States,* . . . .
>
> Not having the power of appointment, unless expressly granted or incidental to its powers, the legislature cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection, though the case might be different if the additional duties were devolved upon an appointee of the Executive.

The foregoing discussion demonstrates the flaw in the argument, occasionally made, that the doctrine of separation of powers protects the executive branch only in areas that are inherently executive, and that Congress may reserve to itself control over activities entrusted to the Executive which are not "truly" executive in nature. This reasoning overlooks the basic truth that there are few activities that are clearly executive, legislative, or judicial. The first two categories, in particular, overlap to an enormous extent. Much, if not indeed most, executive action can be the subject of legislative prescription. To contend, therefore, that Congress can control the Executive whenever the Executive is performing a function that Congress might have undertaken itself is to reduce the doctrine of separation of powers to a mere shadow.

The test is not whether an activity is inherently legislative or executive but whether the activity has been committed to the Executive by the Constitution and applicable statutes. In other words, the Constitution provides for a broad sweep of possible congressional action; but once a function has been delegated to the executive branch, it must be performed there, and cannot be subjected to continuing congressional control except through the constitutional process of enacting new legislation.

### 2. Interpreting the law

Section 1232(d) authorizes disapproval of a regulation by concurrent resolution if Congress "find[s] that the final regulation is inconsistent with the Act from which it derives its authority . . . ." That section, on its face, purports to vest in the two Houses of Congress an extra-legislative power to perform the function reserved by the Constitution to the courts of determining whether a particular executive act is within the limits of authority established by an existing statute.[8] It is clear that the President constitutionally can be overruled in his interpretation of the law, by the courts and by the Congress. But the Congress can do so only by passing new legislation, and passing it over the President's veto if necessary. That is the constitutional system.

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[7] In such a situation, the Executive, as a practical matter, may be giving up a measure of authority granted by the statute being administered which the courts in an appropriate case would have found to have been delegated to the Executive, if Congress had not intervened. Such a diminution of authority must, in my view, be viewed analytically as a repeal of the substantive statute to that extent.

Proponents of the legislative veto, however, argue that such devices actually fortify the separation of powers by providing Congress with a check on an agency's exercise of delegated power. No doubt congressional review provides a check on agency action, just as committee review or committee chairman review would provide a check. But such review involves the imposition on the Executive of a particular interpretation of the law—the interpretation of the Congress, or one House, or one committee, or one chairman—without the check of the legislative process which includes the President's veto. In that case Congress is either usurping the power of the President to execute the law, or of the courts to construe it; or Congress is legislating. If it is legislating, the Constitution is explicit that the President must have the opportunity to participate in that process by vetoing the legislation.

## II.

Because it is my opinion that § 1232(d) is unconstitutional, it is necessary for me to consider whether that provision is severable from the underlying grants of statutory authority upon which the regulations promulgated by you were based. Section 1232(d) was enacted in 1974. When the various authorities for the four regulations disapproved by Congress were enacted in the Education Amendments of 1978, Congress gave no indication that the substantive rulemaking powers delegated to you were to be extinguished if the legislative veto device in § 431 were to be found unconstitutional. Thus, I conclude that § 431 is severable from this basic grant of substantive power. *See, e.g., Champlin*

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[8] The role of the Judiciary in requiring conformance by the two political branches to constitutional standards and in confining the Executive to execution of the law within the bounds established by statute is too familiar to require elaboration. It is therefore not surprising that the Supreme Court has consistently taken the position that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," thus denying any Congress any binding role in the interpretation of an earlier Congress' acts. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348–49 (1963), quoting *United States* v. *Price*, 361 U.S. 304, 313 (1960). The Court, in taking this position, has recognized both the political nature of the legislative process and differences between the functional competencies of the courts and Congress. *See United States* v. *United Mine Workers of America*, 330 U.S. 258, 282 (1947). I note that in these three cases in which the Court cautioned against permitting the views of a subsequent Congress to influence interpreting the intent of an earlier Congress in passing a particular statute, the Court was faced with situations in which the subsequent expression of Congress' view came in the context of the passage of legislation. Thus, in those cases, even any marginal relevance of the subsequent congressional expression would have been subject to the President's veto under Article I, § 7.

*Refining Co.* v. *Corporation Commission of Oklahoma,* 286 U.S. 210, 234 (1932), quoted with approval in *Buckley* v. *Valeo, supra,* 424 U.S. at 108.

### III.

Within their respective spheres of action the three branches of government can and do exercise judgment with respect to constitutional questions, and the judicial branch is ordinarily in a position to protect both the government and the citizenry from unconstitutional action, legislative or executive; but only the executive branch can execute the statutes of the United States. For that reason alone, the Attorney General must scrutinize with caution any claim that he or any other executive officer may decline to defend or enforce a statute whose constitutionality is merely in doubt. Any claim by the Executive to a power of nullification, even a qualified power, can jeopardize the equilibrium established by our constitutional system.

At the same time, the Executive's duty faithfully to execute the law embraces a duty to enforce the fundamental law set forth in the Constitution as well as a duty to enforce the law founded in the Acts of Congress, and cases arise in which the duty to the one precludes the duty to the other. In rendering this opinion on the constitutionality of § 431, I have determined that the present case is such a case.

Section 431 intrudes upon the constitutional prerogatives of the Executive. To regard these concurrent resolutions as legally binding would impair the Executive's constitutional role and might well foreclose effective judicial challenge to their constitutionality.[9] More important, I believe that your recognition of these concurrent resolutions as legally binding would constitute an abdication of the responsibility of the executive branch, as an equal and coordinate branch of government with the legislative branch, to preserve the integrity of its functions against constitutional encroachment. I, therefore, conclude that you are authorized to implement these regulations.

Sincerely.
BENJAMIN R. CIVILETTI

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[9] The history of so-called "legislative veto" devices, of which § 431 of the GEPA is one, illustrates the difficulty in achieving judicial resolution of such an issue. Although Congress enacted the first such mechanism in 1932, only a few reported cases have potentially involved the constitutional question inherent in the legislative veto, and a court has reached the issue only once. In *Atkins* v. *United States,* 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied,* 434 U.S. 1009 (1978), the Court of Claims held, four-to-three, that the provision of the Federal Salary Act of 1967, 2 U.S.C. § 359(1)(B), which permits one house of Congress to disapprove the President's proposed pay schedule under the Act, is not unconstitutional, and that the Senate's veto of a proposed judicial salary increase was therefore lawful. This Department, representing the United States, argued that the veto was unconstitutional, but that, because the veto authority was not severable from the remainder of the Salary Act, the plaintiffs had no right to additional pay. The latter view was sustained in *McCorkle* v. *United States,* 559 F.2d 1258 (4th Cir. 1977), *cert. denied,* 434 U.S. 1011 (1978).

Other cases in which the validity of a legislative veto device has been argued include *Chadha* v. *Immigration and Naturalization Service,* No. 77–1702 (9th Cir., argued April 10, 1978); and *Clark* v. *Valeo,* 599 F.2d 642 (D.C. Cir.) *aff'd,* 431 U.S. 950 (1977) (issue not ripe for determination).

## Rights-of-Way Across National Forests

**The Act of June 4, 1897, does not grant a right of access to owners of land surrounded by national forests, other than actual settlers, and the Secretary of Agriculture has discretionary authority to deny such access unless a right otherwise exists.**

**The common law doctrine of easement by necessity does not apply to land owned by the federal government, but a right of access may be implied from the terms of a federal land grant in some circumstances. No statutes currently modify any such implied right found to exist.**

**Absent a prior existing access right, the Secretary of Agriculture may deny "adequate access" to land within a national forest wilderness area, but must offer a land exchange as indemnity.**

June 23, 1980

THE SECRETARY OF AGRICULTURE

MY DEAR MR. SECRETARY: This replies to your letter of September 18, 1979, requesting my opinion on several questions concerning access rights of private owners of land located within the boundaries of the national forests. Your letter poses the following questions:

(1) Whether the Organic Act of June 4, 1897,[1] grants to private landowners,[2] other than actual settlers, a right of ingress to and egress from their properties located within the exterior boundaries of the national forests, or whether you may deny such access;

(2) Whether private landowners with property located within the exterior boundaries of the national forests have a right-of-way across national forest lands by implied easement or easement by necessity enforceable against the federal government; and, if so, whether this right-of-way is limited to those instances in which the United States by its conveyance created a situation in which nonfederal lands are surrounded by public lands;

(3) Whether, if a right-of-way exists across national forests, it has been modified by:

(a) The Organic Act of June 4, 1897, 16 U.S.C. § 478;

(b) The Wilderness Act, § 5(a), 16 U.S.C. § 1134(a);

(c) The Act of October 13, 1964, 16 U.S.C. §§ 532–538;

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[1] Act of June 4, 1897, ch. 2, § 1, 30 Stat. 36 (codified at 16 U.S.C. § 478).

[2] As used in this opinion, the term "private landowners" refers to all nonfederal landowners unless otherwise indicated.

(d) The Montana Wilderness Study Act of 1977, § 3, 16 U.S.C. § 1132 note; or

(e) Any other statute; and

(4) Whether § 5(a) of the Wilderness Act, 16 U.S.C. § 1134(a), authorizes you to deny access and offer as indemnity an exchange of national forest land for private land, or whether the private landowner may insist on a right of access.

I conclude, first, that the Organic Act of June 4, 1897, does not grant a right of access to owners of land surrounded by national forests, other than actual settlers, and that you have discretionary authority to deny such access, provided that a right of access does not otherwise exist. Of course, access cannot be denied arbitrarily.

Second, in my opinion, the common law doctrine of easement by necessity does not apply to land owned by the federal government. A right of access may be implied from the terms of a federal land grant only if Congress intended to grant the right. This intent may be shown from the circumstances surrounding the grant, including the purpose for which it was made.

Third, none of the statutes you have asked us to consider, nor any others that we have found, would modify such a right in any case in which it is found to exist.

Fourth, I conclude that, absent a prior existing access right, you may deny "adequate access" under the Wilderness Act, but you must offer a land exchange as indemnity.

## I.

Your first question is whether Congress has given private inholders[3] a statutory right of ingress and egress with respect to their property, including a right to build roads. Congress clearly has the power to grant such statutory rights.[4] The question is whether it has done so.

Your department concludes that the Organic Act of June 4, 1897, grants a right of access, including a right to build roads, to all owners of land surrounded by national forest reserves. Section 478, the codification of § 1 of the Act, provides:

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[3] An "inholder" is a landowner whose property is completely surrounded by property owned by the United States. Again, as used in this opinion the term "private inholder" refers to all nonfederal inholders.

[4] The power to control public lands is granted to Congress by the Constitution:

> The Congress shall have Power to Dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States. . . .

U.S. Const., Art. IV, § 3, cl. 2. This comprehensive congressional authority over public lands includes the power to prescribe the times, conditions, and mode of transfer *(United States* v. *Gratiot,* 39 U.S. (14 Pet.) 526, 537–38 (1840)); to declare the effect of title emanating from the United States (*Bagnell* v. *Broderick,* 38 U.S. (13 Pet.) 436, 450 (1839)); and to prevent unlawful occupation of public property (*Camfield* v. *United States,* 167 U.S. 518, 525 (1897)). In *Kleppe* v. *New Mexico,* 426 U.S. 529, 539 (1976), the Court stated: "[W]hile the furthest reaches of power granted by the Property Clause have not yet been definitely resolved, we have repeatedly observed that the power over public lands thus entrusted to Congress is without limitation."

> Nothing in sections 473 to 478, 479 to 482 and 551 of this title shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of national forests, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of Agriculture. Nor shall anything in such sections prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof. Such persons must comply with the rules and regulations covering such national forests.

In 1962, Attorney General Kennedy was asked by the Secretary of Agriculture for his opinion on the meaning of this statute. *See* 42 Op. Att'y Gen. 127 (1962). Prior to 1962, your department interpreted the first sentence of § 478 as granting a right of access to all owners of land surrounded by a national forest. It reasoned that the term "ingress and egress" included the construction of wagon roads, and that the term "actual settlers" included any person or corporation owning property within the boundaries of national forests. As a result, private landowners, including lumber corporations, were considered to have a statutory right to build logging roads. *Id.* at 130. Attorney General Kennedy opined that the term "actual settlers" includes original settlers who reside on the land, and excludes corporations and other business entities.[5] He further concluded that the Secretary of Agriculture has discretionary authority to impose a reciprocity requirement on requests by inholders, other than actual settlers, to use existing roads or to build new roads within national forests. *Id.* at 142–45.

You have advised us that, notwithstanding the 1962 opinion, your department has continued to maintain that § 478 creates a right of access for all private inholders. This interpretation, you have informed us, has been based upon the second sentence of § 478, which was not directly addressed in the 1962 opinion. My review of the reasoning set forth in that earlier opinion, as well as my analysis of § 478 and its legislative history, convinces me that no such access right exists.

The 1962 opinion analyzed § 478 by dividing it into the following three categories: (1) ingress and egress of actual settlers; (2) construction of wagon roads and other improvements by actual settlers; and (3) entry upon the national forest for all proper and lawful purposes by any person. *Id.* at 127, 138–39. We are concerned here only with the third category because you inquire as to the rights of landowners other than actual settlers. In this category, "entry upon" may be subdivided into entry by mere ingress and egress, in particular the use of existing roads, and entry requiring construction of roads. Section 478 provides that any entry upon the forest reserve by any person is subject to the rules and regulations covering such national forests. The question now presented, therefore, is whether the Secretary's regulations may, in appropriate cases, include denial of the requested entry.

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[5] Between the extremes of the original settler and corporations or business entities are intermediary types of property owners such as heirs or assigns of an actual settler. The 1962 opinion did not consider whether those intermediary property owners are "actual settlers" within the meaning of the Act. 42 Op. Att'y Gen. 127, 138 (1962).

To determine correctly the scope of rights protected by the 1897 Act, it is necessary to study carefully the language of the Act itself, and its legislative history. As the legislative history is fully summarized in the 1962 opinion, I note only the aspects particularly relevant here. At the outset, it is helpful to review the sequence of events which led to the passage of the Act. During the 1800's the public entered freely upon federal land, and Congress, although it did not provide specific legal authority for most uses of the public domain, made no serious attempt to halt such uses. *See generally* G. Robinson, The Forest Service 2–5 (1978); Clawson & Held, The Federal Lands 46 (1957). This tacit approval constituted an open invitation to the public to avail itself of the federal land without specific authorization. Most people assumed that the United States was a temporary titleholder and that the land would eventually pass into private ownership. *See* R. Robbins, Our Landed Heritage: The Public Domain, 1776–1970, 5–6 (1976). The public land laws of the era, including preemption laws,[6] homestead laws,[7] and mining laws,[8] presumed unimpeded access to the public domain.

This policy of unimpeded access was recognized by the Supreme Court in *Buford* v. *Houtz*, 133 U.S. 320, 326 (1890), a case in which the Court considered the complaints of owners of alternate odd-numbered sections of land that sheepowners were damaging their land by driving sheep across it to reach the even-numbered sections of the public domain. The Court denied plaintiffs' request for an injunction with the following explanation:

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[6] The Act of May 29, 1830, 4 Stat. 420–21, first granted preemption rights to settlers. Under its terms, any person who had settled on the public domain and had cultivated a tract of land was authorized to purchase any number of acres up to a maximum of 160 acres upon paying to the United States a minimum price for the land.

[7] The first homestead act was passed in 1862. Act of May 20, 1862, 12 Stat. 392–93. It provided that certain persons could enter unappropriated public lands and, upon satisfying certain conditions, obtain a Government patent therefor.

[8] The Mining Law of 1866 (Act of July 26, 1866, ch. 262, 14 Stat. 251) opened mineral deposits on public lands to exploration, claim, and occupation. The only specific reference to rights-of-way appeared in § 8, which granted a right-of-way for the construction of highways over public lands not reserved for public uses. The Mineral Location Law of 1872 (Act of May 10, 1872, ch. 752, 17 Stat. 91–96) did not mention access across the public domain. From the outset, however, federal mining laws have been construed as an invitation to enter, discover, and locate claims upon public lands not withdrawn or reserved. *See, e.g., Union Oil Co.* v. *Smith*, 249 U.S. 337, 346–47 (1919); *United States* v. *Carlile*, 67 I.D. 417, 421 (1960). *See generally* J. Lonergan, *Access to Intermingled Mineral Deposits, Mining Claims and Private Lands Across Surrounding Public Domain and National Forest Lands*, 8 Land & Water L. Rev. 124 (1973).

> We are of opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States . . . shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use. . . .
>
> The whole system of the control of the public lands of the United States as it had been conducted by the Government, under acts of Congress, shows a liberality in regard to their use which has been uniform and remarkable.

133 U.S. at 326–27. The Court refused to allow the complainants, under the pretense of owning a small portion of a tract of land, to obtain control over the entire tract and thereby deny defendants their privilege to use the public domain. 133 U.S. at 322. *See also, Broder* v. *Water Co.*, 101 U.S. 274, 276 (1879) (Court noted conduct of government encouraging development of mines and construction of canals and ditches on public domain); *Forbes* v. *Gracey*, 94 U.S. 762 (1876) (Court noted tacit consent to enter upon the public lands for the purposes of mining); *Atchison* v. *Peterson*, 87 U.S. (20 Wall.) 507 (1874) (Court noted "silent acquiescence" to the general occupation of the public lands for mining).

In the late 19th century, efforts expanded to protect the Nation's natural resources from the results of what were perceived as overly generous land-use policies. *See* Robbins, *supra*, at 301–24. In 1891, the Congress passed a law authorizing the President to reserve forest lands from the public domain. Act of March 3, 1891, ch. 561, § 24, 26 Stat. 1103. One provision of this Act, § 24, later known as the Forest Reserve Act of 1891, was added as an amendment by the conference committee.[9] The amended bill was considered in the closing days of the Congress on an oral presentation of its terms, no printed version being available. It was approved with little debate.[10] The status of these forest reserves was not defined, nor were guidelines provided for the management of the reserves.

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[9] Section 24 provided:

> [T]he President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

[10] Some Senators expressed concern about not knowing exactly what was in the report, but the majority felt that in the closing days of the session "there has got to be something taken for granted or else the public business cannot go forward as it should." 22 Cong. Rec. 3546-47 (1891). The brief House debate appears at 22 Cong. Rec. 3613–16 (1891).

On February 22, 1897, President Cleveland, pursuant to the 1891 Act, issued proclamations placing approximately 20 million acres of public land in forest reserves. Presidential Proclamations Nos. 19-31, Feb. 22, 1897, 29 Stat. 893-912. Within the boundaries of the reserves were villages, patented mining claims, homestead claims of actual settlers and other developments. *See* 30 Cong. Rec. 901-02 (1897). Each of the proclamations contained the following admonition: "Warning is hereby expressly given to all persons not to enter or make settlement upon the tract of land reserved by this proclamation." *See, e.g.*, 29 Stat. 894 (1897). The proclamations also prohibited the general use of timber on the reserves, and jeopardized other theretofore legitimate activities of persons living within or near the reserves.

Congressmen from states affected by the proclamations expressed outrage at what they considered the President's hasty and ill-advised action. 30 Cong. Rec. 902 (1897). This reaction culminated in the passage of an amendment to the Sundry Civil Expense Appropriation Act, 30 Stat. 36 (1897). This amendment was designed to solve the "difficulties surrounding these forest reservations" *(id.* at 900) and to provide for "administering the forest so reserved" (*id.* at 909).[11] Senator Carter of Montana explained that the amendment was offered "not for the purpose of benefitting any particular individual or class of individuals, but for the purpose of permitting existing communities in the United States to enjoy the privileges which have ordinarily been accorded to the pioneer settlers on the frontier everywhere." *Id.* at 902. Other Senators also criticized the provision prohibiting entry or settlement upon the reserves. *Id.* at 910-11. Senator Allison of Iowa stated: "[I]f segregations are made I think every interest *existing at the time,* however remote it may be, should be protected." *Id.* at 911 (emphasis added). The House debate on the amendment indicates that the congressmen also were concerned about preserving existing uses of the forest reserves. *Id.* at 1007-13 (remarks of Representatives Castle, Knowles, Lacy, and DeVries).[12]

The bill was referred to a conference committee, which reported the bill without changes in or comments upon the access section. *Id.* at 1242-43. During the Senate debate on the conference report, some of the same western Senators on whose behalf the amendment was introduced sought to change the clause "actual settlers residing within the boundaries of national forests" to "bona fide settlers or owners within a reservation." *Id.* at 1278-81. Senator White explained that the provision as drafted did not adequately protect all persons who had acquired title in fee from the government. *Id.* at 1278. The amendment was defeated. *Id.* at 1285. Opponents of the amendment emphasized that there was no intent to deprive any person of access to his property, and that "whatever rights have been acquired as respects the public lands under the public land laws are reserved and preserved." *Id.* at 1283. It was noted that entry upon the forests was subject to the rules and regulations of the Secretary of Interior (who then had this administrative authority) and that such rules would not likely prevent access to a person's home. *Id.* at 1280 (remarks of Senator Berry). Notwithstanding the concession that the bill was "imperfect," the conference report was agreed to. It was pointed out that further amendment would cause substantial delay and that any evils could be corrected by subsequent legislation. *Id.* at 1282–83. The House adopted the conference report without debate on this provision. *Id.* at 1397–401.

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[11] The amendment temporarily restored the withdrawn lands to the public domain by suspending the operation of the presidential proclamations for approximately one year. 30 Cong. Rec. 899-900 (1897). It also clarified the President's authority to revoke, modify, or suspend such proclamations.

[12] For a complete discussion of this legislative history, see 42 Op. Att'y Gen. 127, 135-38 (1962).

This legislative history demonstrates that the effect of the second sentence of § 478 is to protect whatever rights and licenses with regard to the public domain existed prior to the reservation. We interpret the provision as a congressional declaration that the establishment of forest reserves would not alter the long-standing policy of allowing unimpeded access to the public land or interfere with the rights of persons then using the land, not as an affirmative grant of a broad right of entry to all persons. The express language of the statute provides that nothing *in the act* shall be construed to prohibit certain activities. The language grants no rights not already in existence. *See* Robbins, *supra,* at 323; John Ise, The United States Forest Policy 140 (1920).

The protection of "lawful" and "proper" entry upon the reserves cannot be construed to limit congressional authority to regulate such entry. No vested right to use the public domain for a particular purpose arises from the government's mere acquiescence in such use. In *Light* v. *United States,* 220 U.S. 523 (1911), the Court wrote:

> [W]ithout passing a statute, or taking any affirmative action on the subject, the United States suffered its public domain to be used for such purposes. There thus grew up a sort of implied license that these lands, thus left open, might be used so long as the Government did not cancel its tacit consent. *Buford* v. *Houtz,* 133 U.S. 326. Its failure to object, however, did not confer any vested right on the complainant, nor did it deprive the United States of the power of recalling any implied license under which the land had been used for private purposes.

*Id.* at 535. *See also The Yosemite Valley Case,* 82 U.S. (15 Wall.) 77 (1872); *Frisbie* v. *Whitney,* 76 U.S. (9 Wall.) 187, 194 (1869).

Section 478 clearly subjects entry upon the national forests to reasonable regulation by the Secretary. Prior to the enactment of the Federal

Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701–1782, and its repeal of § 2 of the Act of June 4, 1897, 16 U.S.C. § 551, insofar as the latter section applied to the issuance of rights-of-way through public lands, the Secretary was required to read § 478 and § 551 together. *United States* v. *Grimaud*, 220 U.S. 506, 515 (1911). Section 551 provides that the Secretary shall "make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction . . . ." This section was held to confer upon the Secretary a "broad scope of regulation" intended to "be effective." *See* 42 Op. Att'y Gen. 127, 140, *citing Chicago Mil. & St. P. Ry.* v. *United States*, 218 F. 288, 298 (9th Cir. 1914), *aff'd*, 244 U.S. 358 (1917); *Shannon* v. *United States*, 160 F. 870, 873 (9th Cir. 1908). In *Grimaud*, the Court stated that the Secretary "is required to make provisions to protect the forest reserves from depredation and harmful uses." 220 U.S. at 552. The Secretary's authority to grant rights-of-way across national forest lands now is based on 16 U.S.C. §§ 532–538, and FLPMA, 43 U.S.C. §§ 1761–1771. Both statutes authorize the Secretary to protect the forest lands.[13]

This interpretation is consistent with the 1962 opinion of the Attorney General.[14] His review of the legislative history of § 478 disclosed a legislative desire to protect explicitly only the rights of ingress and egress of actual settlers. 42 Op. Att'y Gen. 127, 138. He found that entry upon the national forests by all other persons is subject to your rules and regulations covering the forests and discussed the scope of your regulatory authority as follows:

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[13] Section 504 of FLPMA, 43 U.S.C. § 1764, directs the Secretary to issue regulations with respect to the terms and conditions of the rights-of-way. Section 505, 43 U.S.C. § 1765, requires, *inter alia*, that each right-of-way permit contain terms and conditions which will "protect the environment," "protect Federal property," and "otherwise protect the public interest in the lands traversed by the rights-of-way or adjacent thereto." The Act of October 13, 1964, 16 U.S.C. §§ 532–538, which generally concerns the construction and maintenance of a system of roads within the national forests, authorizes the Secretary to grant permanent or temporary easements "under such regulations as he may prescribe." 16 U.S.C. § 533.

[14] In 1964, in response to the Attorney General's 1962 opinion, Congress passed legislation giving the Secretary the authority to grant permanent or temporary easements over lands managed by the Department of Agriculture. Pub. L. No. 88-657, § 2, 78 Stat. 1089 (1964). The committee reports of both the House and the Senate indicate that Congress understood the Attorney General's opinion to hold that § 478 was "not to be construed as a statutory guarantee of access to private lands within the national forests." S. Rep. No. 1174, 88th Cong., 2d Sess. 4 (1964); H.R. Rep. No. 1920, 88th Cong., 2d Sess. 4 (1964). In the Senate report, the committee stated:

> It should be expressly noted that this legislation is intended neither to affirm nor to abrogate the Attorney General's interpretation of the act of June 4, 1897 (30 Stat. 36, 16 U.S.C. 478), with respect to the act's assurance or lack of assurance concerning access to private lands across national forest lands. However, the predictable effect of this legislation will be to minimize the likelihood of litigation between the United States and private landowners designed to test applications of the Attorney General's interpretation of the act of June 4, 1897. This legislation will provide to most owners of private land a satisfactory alternative to statutory assurance of access to and from their lands. The committee therefore recommends enactment of the act as amended.

Amendments which would have created a statutory right of access were rejected both in committee (S. Rep. No. 1174, at 8) and on the Senate floor. 110 Cong. Rec. 16,413–15 (1964).

> As the Supreme Court pointed out in *United States* v. *Grimaud*, 220 U.S. 506, 516–17, it is your function to determine what private use of the national forests in any given case is consistent with the purposes sought to be attained by the statute. The imposition of harsh and onerous requirements not related to the benefit received or to your general responsibility to preserve and manage the national forests, might well constitute an abuse of discretion.

42 Op. Att'y Gen. at 147.

Your department argues that it has a long-standing policy that the Secretary is without discretion to deny access under § 478, and that a change in this policy would have a drastic effect on the well-established expectations of landowners within the national forests. It is a familiar principle that interpretations made contemporaneously with the enactment of a statute and consistently followed for a long period are entitled to great weight, particularly if they have been relied on by the public. *See Zuber* v. *Allen*, 396 U.S. 168, 192–93 (1969); *Alaska S.S. Co.* v. *United States*, 290 U.S. 256, 262 (1933); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933). Correspondingly, when an agency's interpretation has been neither consistent nor long-standing, the weight given it diminishes accordingly. *See Southeastern Community College* v. *Davis*, 422 U.S. 397, 411–12 (1979); *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 858–59 n.25 (1975). Prior to 1962, your department relied on the first sentence of § 478 to find the same rights you now find in the second sentence. This 1962 revision of the department's interpretation occurred almost 70 years after enactment of the statute.[15]

In any case, to the extent that my judgment is governed by the customary rules of statutory construction, I am guided by the overriding rule that the statute, and not the agency's interpretation, is conclusive. *See, e.g.*, *VolksWagenwerk* v. *Federal Maritime Commission*, 390 U.S. 261, 272 (1968). Additionally, I am persuaded by the legislative history and by the common sense rule that legislative history disclosing Congress' intent is entitled to more weight than a conflicting administrative interpretation and must control. *See Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933); Sutherland, Statutes and Statutory Construction § 49.04 (1973 & Supp. 1975).

In sum, I conclude that § 478 does not grant access rights to private inholders other than actual settlers. In my opinion, absent a right of access otherwise granted to the landowner by Congress, you may deny requested access if such denial will protect the public interest in the land to be traversed. Because you may not arbitrarily deny access to private landowners, I do not foresee that this interpretation will have a drastic effect on their expectations.

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[15] In *Soriano* v. *United States*, 494 F.2d 681, 683 (9th Cir. 1974), the court declined to give special deference to a regulation promulgated more than 100 years after enactment of the statute.

## II.

Your second question is whether an inholder has an easement by necessity or other implied easement across national forest land. The conclusion in Part I (that § 478 does not grant a right of access to private property across national forest reserves, and that, absent an access right otherwise guaranteed to a landowner by Congress, § 478 allows denial of access) renders apparent the importance of this question.

In the 1962 opinion, the Attorney General stated that whether an easement by necessity lies against the government is a complex and controversial question. While he concluded that it need not be decided at that time, the Attorney General nonetheless offered his view that such an easement does not exist over public lands. 42 Op. Att'y Gen. 127, 148. It is also my view that the common law doctrine of easement by necessity does not apply to congressional disposition of the public domain. This does not mean, however, that access cannot otherwise be implied. In my opinion, access may be implied if it is necessary to effectuate the purpose for which the land was granted.

The doctrine of easement by necessity is a common law property concept that was recently described by the Supreme Court as follows: "Where a private landowner conveys to another individual a portion of his lands in a certain area and retains the rest, it is presumed at common law that the grantor has reserved an easement to pass over the granted property if such passage is necessary to reach the retained property." *Leo Sheep Co.* v. *United States,* 440 U.S. 668, 679 (1979).[16] Authoritative treatises on property law identify three basic prerequisites to the creation of an easement by necessity.[17] First, the titles to the two tracts in question at some time must have been held by one person. This is the unity-of-title requirement. Second, the unity of title must have been severed by a conveyance of one of the tracts. Third, the easement must be necessary in order for the owner of the dominant tenement to use his land. This necessity must exist both at the time of the severance of title and at the time of application for the exercise of the easement.[18]

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[16] In *Leo Sheep,* the Court considered the question whether the United States had reserved an easement to pass over lands which had passed from federal ownership. Your inquiry, conversely, is whether the United States granted an easement to a federal land grantee to pass over retained lands to reach the conveyed property. The *Leo Sheep* case is discussed *infra* at pages 19–20, note 28.

[17] *See generally* 3 Powell on Real Property § 410 (1979); 2 Thompson on Real Property § 363, at 424–27 (1961 & Supp. 1978); 3 Tiffany, Law of Real Property § 793 (3d ed. 1939 Supp. 1979); Comment, *Easements By Way of Necessity Across Federal Lands,* 35 Wash. L. Rev. 105, 107 (1960).

[18] Courts have emphasized various factors in applying this doctrine. The Restatement of Property § 476, lists some of these factors:

Continued

*See* 3 Powell on Real Property § 410, at 34-59 to 34-60 (1979); Simonton, *Ways By Necessity,* 25 Colum. L. Rev. 571, 573-79 (1925). Whether this doctrine applies to the government has not been resolved. Courts and commentators have differed.[19]

To determine whether the doctrine applies to property of the federal government, it is necessary to determine what law controls. Here federal law must control. The Constitution vests in Congress alone authority to dispose of and make needful rules concerning the public domain. U.S. Const., Art. IV, § 3, cl. 2. As I have noted earlier in this opinion, this power is vested in Congress "without limitation." *United States* v. *Gratiot,* 39 U.S. (14 Pet.) 526, 537 (1840). *See also Kleppe* v. *New Mexico,* 426 U.S. 529, 536 (1976); *United States* v. *San Francisco,* 310 U.S. 16, 29-30 (1940). The construction of grants by the United States has been held to be a federal, not a state, question. *United States* v. *Oregon,* 295 U.S. 1, 27-28 (1935), *Packer* v. *Bird,* 137 U.S. 661, 669 (1891).[20] With regard to implying an easement across land which the United States still holds in trust for the public, therefore, federal law must control. *Utah Power & Light Co.* v. *United States,* 243 U.S. 389, 404 (1917).[21] Federal property can be made subject to state law only when congressional authorization is clear and unambiguous. *See EPA* v. *California ex rel. State Water Resources Control Bd.,* 426 U.S. 200, 211 (1976); *Kleppe* v. *New Mexico,* 426 U.S. 529, 536 (1976).

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(a) whether the claimant is the conveyor or the conveyee;
(b) the terms of the conveyance;
(c) the consideration given for it;
(d) whether the claim is made against a simultaneous conveyee;
(e) the extent of the necessity;
(f) whether reciprocal benefits result to the conveyor or conveyee;
(g) the manner of use of the land before conveyance;
(h) the extent to which prior use was known.

[19] *See, e.g., United States* v. *Dunn,* 478 F.2d 443 (9th Cir. 1973) (holding, with one judge dissenting, that the doctrine is applicable); *Sun Studs, Inc.,* 83 I.D. 518 (1976) (holding that the doctrine is not applicable). Some commentators state that ways of necessity do not arise against the sovereign. 2 G. Thompson, Commentaries on the Law of Real Property § 362, at 417 (1961); Jones on Easements § 301, at 247 (1898). Others conclude that the doctrine should be applicable. 3 Powell on Real Property § 410 at 34-73 to 34-74 (1979); 3 Tiffany, Law of Real Property § 793 (3d ed. 1939).

[20] When, however, the land has passed from federal ownership, it becomes subject to the laws of the state in which it is located. *See Oregon ex rel. State Land Bd.* v. *Corvallis Sand & Gravel Co.,* 429 U.S. 363, 372 (1977). It follows, therefore, that where title to both a dominant and servient tenement has passed from federal ownership, the question whether the unity-of-title requirement is satisfied by prior government ownership is a question of state law. State courts have reached differing opinions on this question. Courts in California, Florida, Indiana, Oklahoma, Tennessee, and Texas have concluded that unity of title cannot be based on prior government ownership. *Bully Hill Copper Mining & Smelting Co.* v. *Bruson,* 4 Cal. App. 180, 87 P. 237, 238 (1906); *Guess* v. *Azar,* 57 So. 2d 443, 444 (Fla. 1952); *Continental Enterprises Inc.* v. *Cain,* 296 N.E.2d 170, 171 (Ind. 1973); *Dudley* v. *Meggs,* 153 P. 1121, 1122 (Okla. 1915); *Pearne* v. *Coal Creek Min. & Mfg. Co.,* 90 Tenn. 619, 627-28, 18 S.W. 402-04 (1891); *State* v. *Black Bros.,* 116 Tex. 615, 629-30, 297 S.W. 213, 218-19 (1927). Courts in Arkansas, Missouri and Montana have reached the opposite conclusion. *Arkansas State Highway Comm'n* v. *Marshall,* 485 S.W.2d 740, 743 (Ark. 1972); *Snyder* v. *Warford,* 11 Mo. 513, 514 (1848); *Violet* v. *Martin,* 62 Mont. 335, 205 P. 221, 223 (1922).

[21] The rules adopting state law to determine what riparian rights pass in a federal grant are not applicable to the question of ways across federal land. *Utah Power & Light Co.* v. *United States,* 243 U.S. 389, 411 (1917). *See Oregon ex rel. State Land Bd.* v. *Corvallis Sand & Gravel Co.,* 429 U.S. 363, 372 (1977); *United States* v. *Oregon,* 295 U.S. 1, 27 (1935); *Hardin* v. *Jordan,* 140 U.S. 371 (1891).

To determine what rights have passed under federal law, it is necessary to interpret the statute disposing of the land.[22] It is a recognized principle that all federal grants must be construed in favor of the government "lest they be enlarged to include more than what was expressly included." *United States* v. *Grant River Dam Authority,* 363 U.S. 229, 235 (1960); *United States* v. *Union Pac. Ry.*, 353 U.S. 112, 116 (1957).[23] In *Pearsall* v. *Great No. Ry.*, 161 U.S. 646, 664 (1895), the Court wrote: "Nothing is to be taken as conceded . . . but what is given in unmistakeable terms, or by an implication equally clear. . . ." These general rules must not be applied to defeat the intent of Congress, however. The Supreme Court has stated that public grants are "not to be construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication. . . ." *United States* v. *Denver & Rio Grande R.R.*, 150 U.S. 1, 14 (1893). In all cases, the intent of Congress must control. *Id. See also Missouri, K. & T. Ry.* v. *Kansas Pac. Ry.*, 97 U.S. 491, 497 (1878).

These rules dictate that if it is clear that Congress intended to grant access, such access must be acknowledged, its scope consistent with the purposes for which the grant was made.[24] An implied easement defined by the actual intent of Congress must be distinguished from an easement by necessity, which relies on a presumed intent of the parties. There are no clear uniform rules for determining the scope of an easement by necessity. In some cases, it has been held that the scope includes whatever access is necessary for any reasonable, beneficial use of the dominant tenement, not merely the use for which the grant was made. *See, e.g., New York Cent. R.R.* v. *Yarian,* 219 Ind. 477, 39 N.E.2d 604, 606 (1942); *Soltis* v. *Miller,* 444 Pa. 357, 283 A.2d 369, 370–71 (1971); *Meyers* v. *Dunn,* 49 Conn. 71, 78 (1881); *Whittier* v. *Winkley,* 62 N.H. 338, 339–40 (1882); Jones on Easements § 323 (1898). Since the common law doctrine is based on the presumed intent of the parties, its operation may have the effect of disregarding or possibly frustrating the intention of the grantor, absent express language in the conveyance denying an easement. 2 G. Thompson, Law of Real Property § 362 (1961), *citing Lord* v. *Sanchez,* 136 Cal. App. 2d 704 289 P.2d 41 (1955); *Moore* v. *Indiana & Michigan Elec. Co.*, 299 Ind. 309, 95 N.E.2d 210 (1950). Thus, if the doctrine were allowed to operate where the Government is the grantor, the actual intent of Congress would, at the least, become irrelevant, and, in some cases, would be thwarted. Plainly, the application of the common law doctrine would be inconsistent with the established principles that the intent of Congress in disposing of federal land must control, and that rights in government land cannot be presumed to pass by implication.[25]

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[22] We note that your department, without reaching the easement-by-necessity issue, has concluded that an examination of the granting statute is essential to determining access rights. *See* Memorandum: Access to State and Private Inholdings in National Forests at 18, U.S. Dept. of Agriculture (Oct. 31, 1979).

[23] *See also Camfield* v. *United States,* 167 U.S. 518, 524–26 (1897); *United States* v. *Clarke,* 529 F.2d 984, 986 (9th Cir. 1976).

[24] *See Curtin* v. *Benson,* 222 U.S. 78, 86 (1911). In *United States* v. *9,947.71 Acres,* 220 F. Supp. 328, 331 (D. Nev. 1963), the court recognized an implied access right for mining purposes where a mining claim owner had to cross public domain to reach his claim. *Cf. Arizona* v. *California,* 373 U.S. 546, 599–600 (1963); *Winters* v. *United States,* 207 U.S. 564, 575–77 (1908). These cases recognize an implied reservation of water rights for Indian reservations.

The doctrine of easements by necessity was developed to settle disputes between private parties, not disputes involving the federal government.[26] The federal government has at one time held title to over three-fourths of the territory of the United States; it today retains title to approximately one-third of the nation's land. One-Third of the Nation's Land: A Report to the President and to Congress by the Public Land Law Review Comm'n, at 8 (1970). It holds property as sovereign, as well as proprietor, and exercises power beyond that which is available to a private party. *Kleppe* v. *New Mexico,* 426 U.S. 529, 539 (1976); *Light* v. *United States,* 220 U.S. 523, 536–37 (1911). Throughout its history, statutes have been enacted allowing access across its land.[27] It holds land in trust for all the people and in disposing of it is concerned with the public interest. *Utah Power & Light Co.* v. *United States,* 243 U.S. 389, 409 (1917); *Causey* v. *United States,* 240 U.S. 399, 402 (1916). In *Causey,* the Court wrote that "the Government in disposing of its public lands does not assume the attitude of mere seller of real estate at its market value." *Id.*

For these reasons, other doctrines applicable to private landowners have been held inapplicable to the sovereign. In *Jourdan* v. *Barrett,* 45 U.S. (4 How.) 169, 184–85 (1846), the Supreme Court held that no prescriptive rights may be obtained against the sovereign, and in *Field* v. *Seabury,* 60 U.S. (19 How.) 323, 332–33 (1856), the Court held that government patents may not be collaterally attacked as can grants from a private party. In *United States* v. *California,* 332 U.S. 19 (1947), the

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[25] It is noteworthy that since the Attorney General opined in 1962 that the doctrine of easements by necessity was not enforceable across federal land, Congress has not modified the rule. Although this generally is not strong evidence when there is no indication that Congress was aware of the ruling (*Zuber* v. *Allen,* 396 U.S. 168, 194 (1969)), it is more persuasive when, as here, congressional action directly resulted from the opinion. *See* n.14, *supra. See generally Bean* v. *Ledmar,* 368 U.S. 403, 412–13 (1962); *United States* v. *Midwest Oil Co.,* 236 U.S. 459, 481 (1915).

[26] The doctrine has been traced to early English origins. Simonton, *Ways of Necessity,* 25 Colum. L. Rev. 571, 572–78 (1925). It usually has been predicated on public policy favoring land utilization and a presumption of intent. 3 Powell on Real Property § 410 at 34–59 to 34–60 (1979).

[27] *See, e.g.,* Act of March 3, 1875, ch. 252, § 1, 18 Stat. 482 (repealed 1976) (right of way for railroads); Act of March 3, 1891, ch. 561, § 18 (repealed 1976) (right of way for irrigation ditches and canals); Act of Jan. 21, 1895, ch. 37, § 1 (repealed 1976) (right of way for tramrods, canals, and reservoirs); Act of July 26, 1866, ch. 262, § 8, 14 Stat. 253 (repealed 1976) (right of way for highways). These statutes were repealed by the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94–579, §§ 501–511, 90 Stat. 2776–82 (codified at 43 U.S.C. §§ 1761–1771). FLPMA provides, with certain exceptions, that rights of way across government land can only be obtained as provided in that Act. 43 U.S.C 1770. General and comprehensive legislation, prescribing a course of conduct to be pursued and the parties and things affected, and specifically describing limitations and exceptions, is indicative of a legislative intent that the statute should totally supersede and replace the common law dealing with the subject matter. *Isbrandtsen Co.* v. *Johnson,* 343 U.S. 779, 787–88 (1952); *Sneel* v. *Ruppert,* 541 P.2d 1042 (Wyo. 1978); J. Sutherland, Statutes and Statutory Construction § 50.05 (1973 & Supp. 1978).

Court refused to hold that the federal government had forfeited by laches or estoppel its interest in littoral property, stating: "The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property. . . ." *Id.* at 40.

These same reasons lead me to conclude, as did the Court in *Leo Sheep,* that the doctrine of easements by necessity as applicable to federal lands is "somewhat strained, and ultimately of little significance" and that the "pertinent inquiry . . . is the intent of Congress." [28] A grantee is entitled instead to reasonable access across government land to use his property for the purposes for which the land grant was made, if such an access right either expressly or impliedly arises from the act authorizing the land grant.[29]

To interpret correctly congressional intent underlying a statutory land grant, it is necessary to look at the condition of the country when the grant was made, as well as the declared purpose of the grant. *Leo Sheep Co.* v. *United States,* 440 U.S. 668, 682 (1979); *Winona & St. Paul R.R.* v. *Barney,* 113 U.S. 618, 625 (1885); *Platt* v. *Union Pacif. R.R.*, 99 U.S. 48, 64 (1878). In *Superior Oil Co.* v. *United States,* 353 F.2d 34 (9th Cir. 1965), for example, the court looked to the purpose of the grant and concluded that the scope of the implied access was not broad enough to include the type of entry sought. The plaintiff oil company was a lessee of a religious mission which had received a land patent to facilitate and encourage its activities among the Indians. The land in question was surrounded by the Hopi Reservation, which the United States held in trust for the Indians. The issue on appeal was whether the oil company was entitled to move heavy equipment across the reservation to drill for oil on the leased property. In ruling that access was limited to the scope of the grant, the court stated:

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[28] In *Leo Sheep Co.* v. *United States,* 440 U.S. 668 (1979), the Court, in holding that the federal government does not have a reserved easement by necessity across the land of its grantee or its grantee's successor, wrote:

> First of all, whatever right of passage a private landowner might have, it is not at all clear that it would include the right to construct a road for public access to a recreational area. More importantly, the easement is not actually a matter of necessity in this case because the Government has the power of eminent domain. Jurisdictions have generally seen eminent domain and easements by necessity as alternative ways to effect the same results. . . . [S]tate courts have held that the "easement by necessity" doctrine is not available to the sovereign.

*Id.* at 679–81 (footnotes omitted). Of course, the opinion in *Leo Sheep* is not alone dispositive of the question you have asked. It involved a claim by the government grantor, not the private grantee, of an easement by necessity. The Court there did rely substantially on the power of eminent domain, and was careful not to decide the broader question of the availability of the easement-by-necessity doctrine generally. In an earlier case refusing to find a reserved way of necessity for a public easement across private land, a district court stated more broadly: "It is, in my judgment, very doubtful whether the doctrine of ways of necessity has any application to grants from the general Government under the public land laws." *United States* v. *Rindge,* 208 F. 611, 618 (S.D. Cal. 1913). *See also, Sun Studs Inc.*, 83 I.D. 518 (1976). *But see, Bydlon* v. *United States,* 175 F. Supp. 891 (Ct. Cl. 1959); *Mackie* v. *United States,* 195 F. Supp. 306 (D. Minn. 1961).

[29] Of course, even without such an entitlement, a landowner may apply for an easement permit under procedures established pursuant to other statutes. *See* FLPMA, 43 U.S.C 1761–1771; Act of October 13, 1964, 16 U.S.C. 532 *et seq.* It cannot be assumed that Congress, or federal regulatory authorities, will execute their power in such a way as to bring about injustice. *See United States* v. *California,* 332 U.S. 19, 40 (1947).

> Certainly it cannot be said either that public policy demands or that the Indians' trustee impliedly intended a grant of a way of access across Indian lands greater in scope than was required for mission purposes and whose greater scope was necessary only in order to permit the granted lands to be used in a fashion adverse to the interests of the Indians.[30]

Although some courts that have dealt with this issue have written in terms of easements by necessity, most of them in effect have looked at the grant in question and limited access according to the purpose of the grant. The *Superior Oil* case was relied on by the Tenth Circuit in *Kinscherff* v. *United States,* 586 F.2d 159 (10th Cir. 1978), which held:

> An easement by necessity *for some purposes* could possibly have arisen when the United States granted the patent to plaintiffs' predecessor in interest. . . . While nothing ordinarily passes by implication in a patent, *Walton* v. *United States,* 415 F.2d 121 (10th Cir.), an implied easement may arise *within the scope of the patent.*

*Id.* at 161 (emphasis added).

Similar statements appear in *Utah* v. *Andrus,* (unreported) C 79-0037 (D. Utah Oct. 1, 1979), in which Utah claimed an easement by necessity for access to its school grant lands. Relying on *United States* v. *Dunn,* 478 F.2d 443, 444 n.2 (9th Cir. 1973), the district court concluded: "Although this common law presumption might not ordinarily apply in the context of a Federal land grant, the liberal rules of construction applied to school trust land allowed for the consideration of this common law principle and justify its application here." [31] The

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[30] The court, in effect, created a hybrid doctrine, applying principles of both ways of necessity and ways created by the actual intent of the grantor:

> Appellant's position is simply that since the patent for the Mission was in unrestricted fee simple it carried with it by implication a way of necessity over lands of the United States for all purposes to which the conveyed land might lawfully be put.
>
> Such is not the law. The scope and extent of the right of access depends not upon the state of title of the dominant estate, nor the existence or lack of limitations in the grant of that estate, but upon what must, under the circumstances, be attributed to the grantor either by implication of intent or by operation of law founded in a public policy favoring land utilization.

*Superior Oil Co.* v. *United States,* 353 F.2d 34, 36-37 (9th Cir. 1965).

[31] Slip Op. at 8. In *United States* v. *Dunn,* 478 F.2d 443 (9th Cir. 1973), the United States sought an injunction to prevent Dunn, who held title as a grantee of a railroad, from constructing an access road for commercial and residential development of his land. The district court granted partial summary judgment, holding defendants trespassers and the government entitled to immediate possession. The Ninth Circuit reversed, holding that summary judgment was precluded because defendants raised the factual issue whether they had an easement by necessity. *Id.* at 446. The *Dunn* court's only discussion of the application of the doctrine, however, appeared in a footnote response to the dissenting judge. In the dissent, Judge Wright stated simply that he "would hold that under the facts of this case the

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court went on to hold that this right is not absolute, however. It reasoned:

> Under the Constitution Congress has the authority and responsibility to manage Federal land. U.S. Const. art. IV, § 3, cl. 2. . . . There is nothing in the school land grant program that would indicate that when Congress developed the school land grant scheme it intended to abrogate its right to control activity on Federal land. Further, it is consistent with common law property principles to find that the United States, as the holder of the servient tenement, has the right to limit the location and use of Utah's easement of access to that which is necessary for the state's reasonable enjoyment of its right. . . . Thus, the court holds that, although the State of Utah or its lessee must be allowed access to section 36, the United States may regulate the manner of access under statutes such as FLPMA.

Slip Op. at 21.

Cases like *Superior Oil, Kinscherff,* and *Utah* v. *Andrus* lend support to my conclusions with respect to implied rights to access across federal land. While the common law easement by necessity does not run against the United States, a right to access may nonetheless be implied by reference to particular grants. And, to the extent that such implied rights exist, your broad authority—delegated to you by Congress—to manage forest reserves empowers you to regulate their exercise. *See United States* v. *Perko,* 108 F. Supp. 315, 322-23 (D. Minn. 1952), *aff'd,* 204 F.2d 446 (8th Cir.), *cert. denied,* 346 U.S. 832 (1953); *Perko* v. *Northwest Paper Co.,* 133 F. Supp. 560, 569 (D. Minn. 1955).

Determining what implied rights exist in the numerous federal land grants is beyond the scope of this opinion. As set forth above, this determination depends on when the grant was made and for what purpose. Mindful of the goal of giving effect to legislative intent, you must look to the rules the Supreme Court has adopted for interpretation of federal land grants. As discussed previously, land grants generally are to be strictly construed. This rule must be balanced against the conflicting rule that in some situations, certain types of land grants may deserve a more liberal construction because of the circumstances surrounding passage of the statutes in question. *See generally Leo Sheep Co.* v. *United States,* 440 U.S. 668, 682-83 (1979) (railroad land grants);

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doctrine of easement by necessity is not binding on the United States. . . ." *Id.* at 446. The majority responded:

> Since the Government did not, in our judgment, raise the point upon which Judge Wright bases his dissent, we have not discussed it in the opinion, but nevertheless did give it consideration and concluded that it lacked merit.

*Id.* at 444 n.2. I do not find this case persuasive authority for application of the doctrine.

*Wyoming* v. *United States,* 255 U.S. 489, 508 (1921) (state school land grants). Absent express language to the contrary, however, a grant should not be construed to include broad rights to use retained government property, particularly in the case of gratuitous grants. *See United States* v. *Union Pac. R.R.,* 353 U.S. 112, (1957); *Camfield* v. *United States,* 167 U.S. 518 (1897); *Wisconsin Central R.R.* v. *United States,* 164 U.S. 190 (1896); 30 Op. Att'y Gen. 263, 264 (1941).

Once the right, if any, is found to exist, you should consider how that right reasonably should be regulated to protect the public's interest in federal property. It is beyond dispute that such rights are subject to reasonable regulation without a resulting inverse condemnation. *See generally Johnson* v. *United States,* 479 F.2d 1383 (Ct. Cl. 1973) (restriction of access by erection of fence enclosing extended portion of highway held not a taking); 2 Nichols on Eminent Domain § 5.72[1] (1978). Nonetheless, fewer restrictions properly may be imposed on well established, developed uses than on unexercised rights. *See Penn Central Transp. Corp.* v. *City of New York,* 438 U.S. 104 (1978); *Euclid* v. *Amber Realty Co.,* 272 U.S. 365 (1926). Frustration and appropriation are essentially different things. *United States* v. *Grand River Dam Authority,* 363 U.S. 229, 236 (1960), *citing Omnia Co.* v. *United States,* 261, 502, 513 (1923).

## III.

Your third question is whether any act of Congress has modified any implied rights that may accompany federal grants. Of particular concern are the Wilderness Act, 16 U.S.C. §§ 1131–1136, and various wilderness study acts.[32] *See, e.g.,* Montana Wilderness Study Act of 1977, Pub. L. No. 95–150, 91 Stat. 1243; Sheep Mtn. and Snow Mtn. Wilderness Areas, *et al.,* Pub. L. No. 94–557, § 3, 90 Stat. 2635 (1976). These wilderness study acts require you to exercise your discretion so as to preserve the wilderness character of the land.[33] If a request for a particular mode of access would destroy that wilderness character, therefore, you must deny the request. These acts also provide, however, that their mandates are subject to "existing private rights." [34] *See, e.g.,* Montana Wilderness Study Act, § 3(a), 16 U.S.C. § 1132 note. You must determine, therefore, what implied access rights are guaranteed in a particular grant, and allow the exercise of those rights. The wilderness study acts thus do not modify any implied rights that may accompany federal grants.

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[32] The impact of the Wilderness Act is discussed in Part IV.

[33] *See Parker* v. *United States,* 448 F.2d 793 (10th Cir. 1971), *cert. denied sub. nom., Kaibab Industries* v. *Parker,* 405 U.S. 989 (1972) (held Secretary's discretion to enter into the timber harvesting contract for public land is limited by 16 U.S.C. § 1132(b)).

[34] In addition to "existing private rights," the Wilderness Act permits ingress to and egress from mining locations until December 31, 1983. 16 U.S.C. § 1133(d)(3). Such ingress and egress is subject to reasonable regulation by the Secretary of Agriculture, consistent with use of the land for mineral exploration, location, development, production, and related purposes.

Nor do I find that the other statutes you cite modify such implied rights. The Organic Act of 1897, 16 U.S.C. § 478, discussed at length in Part I of this opinion, preserves access rights existing at the time of creation of a forest reserve. The Act of October 13, 1964, 16 U.S.C. 532–538, which authorizes the Secretary of Agriculture to grant easements for road rights-of-way over lands administered by the Forest Service,[35] was passed in reaction to Attorney General Kennedy's 1962 interpretation of 16 U.S.C. § 478, which, as discussed earlier, allowed the imposition of a reciprocity requirement with respect to rights-of-way. By empowering the Secretary of Agriculture to grant permanent easements, the Congress hoped to provide an alternative to statutory assurance of access to and from private inholdings.[36] Thus, the statute does not substantively modify implied rights of access. It does, along with FLPMA, allow the imposition of certain procedural requirements, such as application for a permit prior to road construction. We have found no other statute that substantively modifies implied access rights.

## IV.

Your final question concerns § 5(a) of the Wilderness Act, 16 U.S.C. 1134(a). Your department has concluded that this provision guarantees a private owner "adequate access" to an inholding unless the landowner voluntarily chooses a land exchange. Pursuant to this interpretation, regulations have been promulgated providing that access "shall be given." [37] The Department of the Interior has taken the position that § 5(a) grants the Secretary of the Interior (and, by analogy, the Secretary of Agriculture) the authority to deny access to a landowner, and offer land exchange as indemnity.[38] The Interior Department's interpretation, contrary to yours, under appropriate circumstances would allow denial of "adequate access" to private holdings as well as to state-owned inholdings.

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[35] 16 U.S.C. § 533. *See* p. 10 & note 13 *supra*. This statute was not repealed by FLPMA. With respect to the Secretary of Agriculture's authority under §§ 532–538, FLPMA provided:

> [N]othing in this subchapter shall be construed as affecting or modifying the provisions of sections 532 to 538 of title 16 and in the event of conflict with, or inconsistency between, this subchapter and sections 532 to 538 of title 16, the latter shall prevail: *Provided further*, That nothing in this Act should be construed as making it mandatory, that, with respect to forest roads, the Secretary of Agriculture limit rights-of-way grants or their terms of years or require disclosure pursuant to section 1761(b) of this title or impose any other condition contemplated by this Act that is contrary to present practices of that Secretary under sections 532 to 538 of title 16.

43 U.S.C. § 1770(a).

[36] S. Rep. No. 1174, 88th Cong., 2d Sess. 4 (1964). *See* note 10 *supra*.

[37] 36 C.F.R. § 293.12. This regulation provides in part:

> States or persons, and their successors in interest, who own land completely surrounded by National Forest Wilderness shall be given such rights as may be necessary to assure adequate access to the land. "Adequate access" is defined as the combination of routes and modes of travel which will, as determined by the Forest Service, cause the least lasting impact on the primitive character of the land and at the same time will serve the reasonable purposes for which the State and private land is held or used.

This regulation is consistent with your department's interpretation of 16 U.S.C. § 478. *See* 36 C.F.R. § 212.8(b).

Some initial observations about the Wilderness Act are in order. The purpose of the Wilderness Act is to "secure for the American people of present and future generations the benefits of an enduring resource of wilderness." 16 U.S.C. § 1131(a). "Wilderness" is defined as an area of "undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation." 16 U.S.C. § 1131(c). Section 4(c) of the Act prohibits, with limited exceptions, use of motor vehicles or other mechanical transportation. 16 U.S.C. § 1133(c). It also prohibits permanent roads within any wilderness area, except as specifically provided in the Act, and subject to "existing private rights." *Id.* The Act directs you to administer wilderness areas within your jurisdiction so as to preserve their wilderness character. 16 U.S.C. § 1133(b). The phrase "existing private rights" in § 4(c), 16 U.S.C. § 1133(c), is not defined in the Act or in its legislative history, but, in my opinion, includes existing easements, which are well-recognized rights in property.[39] Thus, in spite of the Act's general prohibitions, if a private inholder has an implied right to a particular type of access, that right is preserved.

The Wilderness Act was developed over a 15-year period, with almost unprecedented citizen participation. *See* S. Rep. No. 109, 88th Cong., 1st Sess. 7 (1963). The first major wilderness bill was introduced in the 85th Congress. S. 1176, 85th Cong., 1st Sess. (1957). In 1961, the Senate passed a wilderness bill, S. 174, but the House failed to pass it.

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[38] Supplemental Memorandum In Support of Plaintiff's Motion for Permanent Injunction, at 14-19, *United States* v. *Cotter Corp.*, No. C 79-0307 (D. Utah Oct. 1, 1979). The current regulation of the Interior Department's Fish and Wildlife Service, 50 C.F.R. 35.13, although somewhat ambiguous, restricts access to means and routes which will "preserve the wilderness character of the area." The regulation provides:

> Rights of States or persons and their successors in interest, whose land is surrounded by a wilderness unit, will be recognized to assure adequate access to that land. Adequate access is defined as the combination of modes and routes of travel which will best preserve the wilderness character of the landscape. Modes of travel designated shall be reasonable and consistent with accepted, conventional, contemporary modes of travel in said vicinity. Use will be consistent with reasonable purposes for which such land is held. The Director will issue such permits as are necessary for access, designating the means and routes of travel for ingress and degress (*sic*) so as to preserve the wilderness character of the area.

[39] *See, e.g., United States* v. *Welch*, 217 U.S. 333, 339 (1910); *Myers* v. *United States*, 378 F.2d 696, 703 (Ct. Cl. 1967). It logically could be argued that the phrase "existing private rights" includes and preserves only those rights which had been exercised at the time the Wilderness Act was passed. Little support exists, however, for this argument that Congress intended to extinguish unexercised access rights, leaving the landowner with only the right to access or exchange under § 5(a). When providing for preservation only of established uses, Congress clearly so indicated. *See* 16 U.S.C. § 1133(d)(1) (permitting established uses of aircraft and motorboats). In S. Rep. No. 109, 88th Cong., 1st Sess. 2 (1963), the committee stated that under the Wilderness Preservation System, "existing private rights *and* established uses" are permitted to continue. (Emphasis added.) A way of access to which a person is entitled by express or implied grant predating the Wilderness Act is a right which existed prior to the effective date of the Act, whether exercised or unexercised.

In 1963, S. 4 was introduced in the 86th Congress. It was identical to S. 174, with one exception not relevant here. It passed the Senate by a large margin (110 Cong. Rec. 17,458 (1964)), but was amended in the House (110 Cong. Rec. 17,461 (1964)). A conference committee was convened and adopted with few amendments the House version of the bill, H.R. 9070. *See* H.R. Rep. No. 1829, 88th Cong., 2d Sess. (1964). The conference bill was approved by both Houses (110 Cong. Rec. 20,603, 20,632 (1964)) and signed by the President on September 3, 1964.

Section 5(a) of the Act deals with state and private property completely surrounded by wilderness areas. It provides:

> In any case where State-owned or privately owned land is completely surrounded by national forest lands within areas designated by this chapter as wilderness, such State or private owner shall be given such rights as may be necessary to assure adequate access to such State-owned or privately owned land by such State or private owner and their successors in interest, or the State-owned land or privately owned land shall be exchanged for federally owned land in the same State of approximately equal value under authorities available to the Secretary of Agriculture: Provided, however, that the United States shall not transfer to a State or private owner any mineral interests unless the State or private owner relinquishes or causes to be relinquished to the United States the mineral interest in the surrounded land.

Since the enactment of the Wilderness Act, your department has interpreted this language to preserve the statutory right of access you found in 16 U.S.C. § 478.[40] Because, in my opinion, § 478 does not grant a right of access to inholders other than actual settlers, the question presented here is whether § 5(a) grants to inholders a broad right of "adequate access" beyond any existing private rights. I believe it does not.

The term "adequate access" is not defined in the Act, but the legislative history makes clear that the term includes access not consistent with wilderness uses.[41] For example, in both the Senate and House

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[40] *See* note 37 *supra.*

[41] Other sections apply to uses consistent with wilderness preservation. In § 5(b), 16 U.S.C. § 1134(b), Congress provided that where valid mining claims or other valid occupancies are surrounded by a national forest wilderness area, the Secretary of Agriculture shall, by reasonable regulations consistent with the preservation of the area as wilderness, permit ingress to and egress from such surrounded areas by means which have been or are being customarily enjoyed with respect to similarly situated areas. *Cf.* 16 U.S.C. § 1133(d) (provides for regulation of ingress and egress consistent with use of land for mineral exploration and development). Section 5(b) did not appear in either S. 174 or S. 4. It did appear in several early House versions of the bill, and these versions expressly included "privately owned lands" in addition to valid mining claims and other valid

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debates, repeated references were made to road construction for motorized vehicles. *See, e.g.*, 107 Cong. Rec. 18,105 (1961); 109 Cong. Rec. 5,925-26 (1963). Accordingly, your regulation defining "adequate access" does not limit access to established uses or to means consistent with wilderness uses. It includes access which "will serve the reasonable purposes for which the state and private land is held or used."[42] What constitutes adequate access will depend on the facts and circumstances of each case, and is a determination left to your discretion.

The Act requires that the state or private inholder be given such rights as are necessary to assure adequate access, or that the land be exchanged for federally owned land of approximately equal value. The language of § 5(a) indicates that a landowner has a right to access *or* exchange. If he is offered either, he has been accorded all the rights granted by the statute. If you offer land exchange, the landowner has no right of access under § 5(a). This interpretation is supported by the legislative history of the section.[43]

The language of § 5(a) first appeared in an amendment to S. 174, 87th Cong., 1st Sess. (1961). Senator Bennett of Utah proposed the amendment in response to concerns of the Western Association of State Land Commissioners, and, accordingly, the amendment pertained only to state-owned land. 107 Cong. Rec. 18,092 (1961).[44] The Senator identified a series of "loopholes" in the bill. He described the 13th loophole as follows: "No provision is made in S. 174 to preserve the right of

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occupancies. This reference to privately owned lands was deleted in later versions of the bill, such as H.R. 9070. The reports do not explain this deletion. It may have occurred because of the decision during the same session to include privately owned land in § 5(a).

The final paragraph of § 5, 16 U.S.C. § 1134(c), authorizes you to acquire state or privately owned land only if either the owner concurs or Congress specifically authorizes the acquisition.

[42] *See* 36 C.F.R. § 293.12, note 27 *supra*.

[43] Your department relies on the legislative history of subsequent legislation to support its contention that § 5(a) grants a right to adequate access to inholders. In a report filed in conjunction with the Indian Peaks Wilderness Area, *et al.*, 16 U.S.C. § 1132 note, the House Committee noted that § 5 of the Wilderness Act requires the Secretary to give private landowners adequate access. H.R. Rep. No. 1460, 95th Cong., 2d Sess. 9-10 (1978). The report does not discuss the exchange option.

This legislative observation is not a part of the legislative history of the Wilderness Act. It is the intent of the Congress that enacted a law that controls interpretation of that law. *United Airlines, Inc.* v. *McMann*, 434 U.S. 192, 200 n.7 (1977); *Teamsters* v. *United States*, 431 U.S. 324, 354 n.39 (1977). Whatever evidence is provided by the report on the subsequent legislation is overcome by conflicting evidence. *See Southeastern Community College* v. *Davis*, 442 U.S. 397, 411-12 (1979); *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 758 (1979).

[44] The resolution passed by the Western State Land Commissioners suggested that the bill be amended to contain the following provision:

> Whenever an area including State-owned land is incorporated in the wilderness system, provision shall be made for access to such land adequate for the reasonable exercise of its rights therein by the State and those claiming under it . . . . Provided, however, that, if the recommendation by which an area including State-owned land is incorporated in the wilderness system shall fail to provide for access to the State-owned land therein, then the owning State may, at its election, use the included State land as base in making indemnity selection of lands, including the mineral rights therein as provided in applicable U.S. statutes.

107 Cong. Rec. 18,103 (1961). The resolution illustrates that the Commissioners also believed access could be denied. The indemnity statutes to which the resolution refers, 43 U.S.C. 851, 852, allow states to make indemnity selections whenever school sections are lost because of other reservations or grants of the land.

access to State school sections or other lands. This should certainly be done or alternatively, the States should be permitted to choose Federal lands in another location in lieu of the land isolated within wilderness areas." *Id.* The choice referred to by Senator Bennett was the choice of lands if access were denied, not the choice of either access or exchange. He stated that the purpose of his amendment was to "give the States access to State lands within wilderness areas established under the bill, or indemnify the States for loss of such access." 107 Cong. Rec. 18,103 (1961). He did not indicate that a state could choose between access and indemnity. His amendment provided in part:

> In any case where State-owned land is completely surrounded by lands incorporated into the wilderness system such State shall be given (1) such rights as may be necessary to assure adequate access to such State-owned land by such State and its successors in interest, or (2) land in the same State, not exceeding the value of the surrounded land, in exchange for the surrounded land. Exchanges of land under the provisions of this subsection shall be accomplished in the manner provided for the exchange of lands in national forests.

107 Cong. Rec. 18,103 (1961). In urging support of his amendment, Senator Bennett explained:[45]

> [T]he Western Association of State Land Commissioners unanimously adopted a resolution calling for indemnification to the States *which will lose access* to State lands in wilderness areas established under S. 174. Where State school sections or other State lands are isolated by wilderness areas, the State should be given an opportunity, *if access is denied,* to make in lieu selections of Federal lands in other areas.

*Id.* (emphasis added).[46] These statements demonstrate that Senator Bennett believed that access not consistent with wilderness preservation could be denied, and wanted to give states an alternative in such circumstances.

The Senator later explained that his amendment was designed to correct problems states had experienced with land exchanges in the past. 107 Cong. Rec. 18,105 (1961). He wanted to ensure that if the state land was "locked up," the state clearly would be entitled to an exchange. He further explained:

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[45] Authority to exchange land is provided by 16 U.S.C. §§ 485, 486 (originally enacted as Act of Mar. 20, 1922, ch. 105, 42 Stat. 465) and 16 U.S.C. § 516 (originally enacted as Act of Mar. 3, 1925, ch. 473, 43 Stat. 1215).

[46] His belief that access to state-owned lands may be denied entirely may result in part from the language of § 4(c), 16 U.S.C. § 1133(c), which specifically protected only existing *private* rights. He made no statements relying on this language, however.

> ***The first choice, providing that the State shall have adequate access, would in fact defeat the value of the wilderness bill,*** assuming there were a very valuable mineral in a State school section, and the State were to decide that it was worth money to drive a road through the wilderness to get to it. This would change the situation with respect to existing law, because we would be imposing particular restrictions, in spirit at least, with respect to access to the land.

*Id.* (emphasis added).

Because of misunderstandings regarding the effect of the proposed amendment on mineral lands, Senator Bennett withdrew the amendment to allow time to confer with other Senators from western states. He re-offered the amendment the following day, with minor changes not relevant here. 107 Cong. Rec. 18,384 (1961). Senator Church, who earlier had expressed reservations about the amendment, now voiced his support. In his brief remarks, he stated:

> I think the amendment is fair to the States involved. If they need rights of access, they should have them; if they want to relinquish the land, they ought to have the right to acquire other land of comparable value.

*Id.* Although we can infer from these remarks an understanding that the section gives states the option of choosing access or exchange, the statement does admit of other interpretations. In light of the evidence to the contrary, the resolution of this question cannot be rested on the remarks of one senator during debate on the Senate floor, where "the choice of words . . . is not always accurate or exact." *In re Carlson,* 292 F. Supp. 778, 783 (C.D. Cal. 1968), *citing United States* v. *Internat'l Union UAW-CIO,* 352 U.S. 567, 585-86 (1957). If the Congress had intended to grant landowners a right to adequate access, it could have done so expressly. Resolving the doubt in favor of the grantee of such a right would violate the well-established rule that any doubts as to congressional grants of property interests must be resolved in favor of the government. *Andrus* v. *Charleston Stone Prod. Co.,* 436 U.S. 604, 617 (1978); *United States* v. *Union Pac. R.R.,* 353 U.S. 112, 116 (1957).

The Senate agreed to Senator Bennett's amendment to S. 174, but S. 174 did not pass the House during the 87th Congress. A House version of the bill did include a similar provision, also applicable only to state-owned land. The House report on this bill indicated that the section required only that a state be given either access or exchange; it did not indicate that the state could choose between them, or that adequate access otherwise was guaranteed. It stated:

> If surrounded land is owned by a State, the State would be given *either* right of access or opportunity of exchange.

> . . . Ingress and egress would be provided for all valid occupancies.

H.R. Rep. No. 2521, 87th Cong., 2d Sess. 108 (1962) (emphasis added).

Variations of Senator Bennett's amendment appeared in both the Senate and House versions of the wilderness legislation in the 88th Congress. S. 4, 88th Cong., 1st Sess. § 3(j) (1963); H.R. 9070, 88th Cong., 2d Sess. § 6(a) (1964). The Senate committee report on S. 4 indicates that the understanding that states could be denied access and offered a land exchange as indemnity remained unchanged:

> Section 3(j) provides that where State inholdings exist in wilderness areas, the State shall be afforded access, or shall be given Federal lands in exchange of equal value.
>
> The amendment is an attempt to clarify the intention of the Senate in regard to section 3(j), which was originally proposed, withdrawn, revised, again proposed and adopted during floor consideration of S. 174 in 1962 [sic]. The amended section represents a more deliberate and careful drafting and consideration.

S. Rep. No. 109, 88th Cong., 1st Sess. 10, 21 (1963).

The House modified this section to include "privately owned land" in the first paragraph regarding "adequate access," rather than in the second paragraph regarding "ingress and egress." This modification is not explained in the House report. *See* H.R. Rep. No. 1538, 88th Cong., 2d Sess. 13 (1963). The change was discussed in both the Senate and House hearings, however. The sentiment expressed was that private owners should have the same rights as the States. *National Wilderness Preservation Act: Hearings on H.R. 9070, H.R. 9162, S. 4 and Related Bills, Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs,* 88th Cong., 2d Sess. 1369–72 (1963). Both public witnesses and congressmen stated that ingress and egress was uncertain under both 16 U.S.C. § 478 and the wilderness acts, and that the same provision for exchange should be made for private owners as was made for States. *Id.* There is no indication that this addition of privately owned lands modified the purpose of the section as identified by Senator Bennett.

In sum, if uses are well-established prior to wilderness designation, they may be permitted to continue.[47] In addition, all existing private rights of access are preserved. Even if the landowner has no prior existing right to access not consistent with wilderness uses, the Wilderness Act requires that "adequate access" be given or that an offer be made to the landowner to exchange the land for federal land of approximately equal value. As a result of § 5(a), therefore, the inholder actually may possess more access "rights" than were possessed prior to wilderness designation. If the landowner rejects an offer of land exchange, he may retain title to the inholding and exercise access rights consistent with wilderness uses, or he may consent to acquisition of his land by the federal government.

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[47] Section 4(d)(1) of the Act, 16 U.S.C. § 1133(d)(1), provides that the "use of aircraft or motorboats, where these uses have already become established, may be permitted to continue subject to such restrictions as the Secretary of Agriculture deems desirable." The committee reports reveal an intent that other well-established uses also be permitted to continue. *See, e.g.,* S. Rep. No. 109, 88th Cong., 1st Sess. 2, 10 (1963). *See also* 109 Cong. Rec. 5926 (1963) (Senator Church, a sponsor of the bill, expressed the view that owners of ranches be allowed to continue "the customary usage of their property for ingress and egress according to the customary ways").

These responses to the questions you have asked should provide satisfactory guidance in your performance of your federal land management responsibilities.

Sincerely,
BENJAMIN R. CIVILETTI

# The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation

**The Attorney General has a duty to defend and enforce both the Acts of Congress and the Constitution; when there is a conflict between the requirements of the one and the requirements of the other, it is almost always the case that he can best discharge the responsibilities of his office by defending and enforcing the Act of Congress.**

**While there is no general privilege in the Executive to disregard laws that it deems inconsistent with the Constitution, in rare cases the Executive's duty to the constitutional system may require action in defiance of a statute. In such a case, the Executive's refusal to defend and enforce an unconstitutional statute is authorized and lawful.**

**July 30, 1980**

**THE CHAIRMAN OF THE SENATE SUBCOMMITTEE ON LIMITATIONS OF CONTRACTED AND DELEGATED AUTHORITY**

**MY DEAR MR. CHAIRMAN: In your letter of June 25, 1980, you asked that I answer eleven questions posed by you concerning the legal "authority" supporting "the Justice Department's assertion that it can deny the validity of Acts of Congress." I am pleased to respond. I have taken the liberty of setting these eleven questions out verbatim so the context in which my answers are given will be clear. My answers follow several preliminary observations about the form of the questions asked and the general nature of the Department's "assertion" in this matter.**

**The Attorney General has a duty to defend and enforce the Acts of Congress. He also has a duty to defend and enforce the Constitution. If he is to perform these duties faithfully, he must exercise conscientious judgment. He must examine the Acts of Congress and the Constitution and determine what they require of him; and if he finds in a given case that there is conflict between the requirements of the one and the requirements of the other, he must acknowledge his dilemma and decide how to deal with it. That task is inescapably his.**

**I concur fully in the view expressed by nearly all of my predecessors that when the Attorney General is confronted with such a choice, it is almost always the case that he can best discharge the responsibilities of his office by defending and enforcing the Act of Congress. That view is supported by compelling constitutional considerations. Within their respective spheres of action the three branches of government can and do exercise judgment with respect to constitutional questions, and the**

Judicial Branch is ordinarily in a position to protect both the government and the citizenry from unconstitutional action, legislative and executive; but only the Executive Branch can execute the statutes of the United States. For that reason alone, if executive officers were to adopt a policy of ignoring or attacking Acts of Congress whenever they believed them to be in conflict with the provisions of the Constitution, their conduct in office could jeopardize the equilibrium established within our constitutional system.

At the same time, I believe that if Congress were to enact a law requiring, for example, that the Attorney General arrest and imprison all members of the opposition party without trial, the Attorney General could lawfully decline to enforce such a law; and he could lawfully decline to defend it in court. Indeed, he would be untrue to his office if he were to do otherwise. This is not because he has authority to "deny the validity of Acts of Congress." It is because everything in our constitutional jurisprudence inescapably establishes that neither he nor any other executive officer can be given authority to enforce such a law. The "assertion" of the Department of Justice is nothing more, nor less, than this.[1]

I have one further observation. In your letter you state that your request "does not include those situations where the Acts themselves touch on constitutional separation of powers between Executive and Legislative Branches . . . ." Since almost all of the legal authority dealing with this question, from the trial of Andrew Johnson to the arguments of Attorney General Levi in *Buckley* v. *Valeo,* 424 U.S. 1 (1976), deal with separation of powers issues, your limitation is stringent. I will not discuss all the pertinent authorities if you will permit me to note that in this field the historical predominance of separation of powers issues is no accident. I have said that the Executive can rarely defy an Act of Congress without upsetting the equilibrium established within our constitutional system; but if that equilibrium has already been placed in jeopardy by the Act of Congress itself, the case is much more likely to fall within that narrow class.

The traditional debate over the nature and extent of the President's supervisory authority as chief executive provides a good illustration of the phenomenon to which I have just referred. From time to time Congress has attempted to limit the President's power to remove, and thereby control, the officers of the United States. Some of these attempts have been consistent with the Constitution; others have not. In every one of these instances, however, it was the Act of Congress itself that altered the balance of forces between the Executive and Legislative Branches; and if the Executive had invariably honored the Act, our constitutional system would have been changed by *fait accompli.* Accordingly, in some of the cases in which the constitutionality of the Act was in doubt, the Executive determined that it could best preserve our constitutional system by refusing to honor the limitation imposed by the Act, thereby creating, through opposition, an opportunity for change and correction that would not have existed had the Executive acquiesced. *See Myers* v. *United States,* 272 U.S. 52 (1926). Inter-branch disputes over other separation-of-powers issues can follow a similar course.

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[1] I note that an analogous situation is presented where an individual subject to a court injunction believes that injunction to be unconstitutional or legally invalid. The well-established rule is that such an injunction must be obeyed until it is dissolved or modified on appeal in order to preserve the integrity of the judicial process. *Walker* v. *City of Birmingham,* 388 U.S. 307 (1967). The Court in *Walker,* however, was careful to emphasize that it did not have before it a case in which "the injunction was transparently invalid." *Id.* at 315. If an Act of Congress directs or authorizes the Executive to take action which is "transparently invalid" when viewed in light of established constitutional law, I believe it is the Executive's constitutional duty to decline to execute that power.

I now turn to your specific questions.

Question 1: What is the specific authority (if any) deriving from English constitutional history which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

As I have suggested, the Department's "assertion" depends entirely upon the proposition that there are fundamental limitations on the authority of the Legislative and Executive Branches of our government. This, in fact, is the central legal principle in our constitutional system—our system of "limited" government—and it is a principle that the English have *rejected.* Accordingly, English constitutional history is important for our purposes, not because it supports my view that in a system of "limited" government there are powers and duties that cannot be imposed upon executive officers, but because it illustrates how constitutional government can develop towards a radically different model—a model in which there is no fundamental limitation upon legislative power. It is true that there are early English cases that I could cite in my behalf. I am reminded in particular of Coke's judgment in *Calvin's Case,* 7 Co. Rep. 1 (immutable natural law prevents Parliament from separating a subject from the protection of his king). But even though these early precedents enjoyed some vitality on this side of the Atlantic as late as the time of the American Revolution (consider, for example, James Otis' classic attack on the writs of assistance, February 24, 1761, printed in Commager, Documents of American History 45 (5th ed. 1949)), they did not carry the day in their own country.

I should add that I consider the 17th century dispute between Parliament and the Stuart kings over the so-called "dispensing power" to be directly relevant to the questions you have raised. The history of that dispute was well-known to the Framers of the Constitution, and it is clear that they intended to deny our President any discretionary power of the sort that the Stuarts claimed. We must remember, however, that it was largely as a result of Parliament's victory in that matter that the English came to abandon any notion that "fundamental law" limited the powers of the legislative sovereign. This is the very notion upon which our Constitution, and the Department's view of this question, depends. In our system of limited government, unlike the English system, there are some things that the legislature and the officers of the government *cannot* lawfully do.

Question 2: What is the specific authority (if any) deriving from the Constitutional Convention and other expressions of the Framers which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

The available evidence concerning the intentions of the Framers lends no specific support to the proposition that the Executive has a constitutional privilege to disregard statutes that are deemed by it to be inconsistent with the Constitution. The Framers gave the President a veto for the purpose, among others, of enabling him to defend his *constitutional* position. They also provided that his veto could be overridden by extraordinary majority in both Houses. That being so, an argument can be made that the Framers assumed that the President would not be free to ignore, on constitutional grounds or otherwise, an Act of Congress that he had been unwilling to veto [2] or had been enacted over his veto.

At the same time, I believe that there is relatively little direct evidence of what the Framers thought, or might have thought, about the Executive's obligations with regard to Acts of Congress that were transparently inconsistent with the Constitution; and, indeed, the question remained open for some time after the Constitution was adopted. President Jefferson, for example, writing of the Alien and Sedition Acts in 1804, concluded that each branch had power to exercise independent judgment on constitutional questions and that this was an important element in the system of checks and balances:

> The judges believing the [Sedition law] constitutional, had a right to pass a sentence of fine and imprisonment; because that power was placed in their hands by the Constitution. But the executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the Constitution. The instrument meant that its coordinate branches should be checks on each other.

8 Writings of Thomas Jefferson 310 (1897).

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[2] The President's failure to veto an unconstitutional Act of Congress does not in itself estop the Executive from challenging the Act in court at a future date, nor does it cure the constitutional defect where the question is one of separation of powers. *See Myers* v. *United States,* 272 U.S. 52 (1926); *National League of Cities* v. *Usery,* 426 U.S. 833, 841 n.12 (1976).

President Jefferson's view was not to prevail, although other early Presidents, including Andrew Jackson, were to express similar sentiments from time to time.

As I have said, I do not believe that the prerogative of the Executive is to exercise free and independent judgment on constitutional questions presented by Acts of Congress. At the same time, I think that in rare cases the Executive's duty to the constitutional system may require that a statute be challenged; and if that happens, executive action in defiance of the statute is authorized and lawful if the statute is unconstitutional. That brings me to your next question.

Question 3: What is the specific authority (if any) deriving from Supreme Court or other judicial opinions which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

In *Myers* v. *United States*, 272 U.S. 52 (1926), the Supreme Court was asked to decide whether the President had acted lawfully in removing a postmaster from office in contravention of an Act of Congress. The Act provided that postmasters were not to be removed by the President without the advice and consent of the Senate. The case involved a claim for back salary filed by the heirs of the postmaster who had been removed. The action was brought in the Court of Claims under statute that gives that court jurisdiction to hear cases not sounding in tort arising out of conduct by executive officers alleged to be unlawful under the Constitution or Acts of Congress.

When the case came before the Supreme Court, the Solicitor General, appearing for the United States, assailed the attempt to limit the removal power. He argued that the statute imposed an unconstitutional burden upon the President's supervisory authority over subordinate officers in the Executive Branch. Senator Pepper made an *amicus curiae* appearance and argued that the statute was constitutional. The Court ruled that the statute was unconstitutional. More to the point, the Court ruled that the President's action in defiance of the statute had been lawful. It gave rise to no actionable claim for damages under the Constitution or an Act of Congress in the Court of Claims.

In my view, *Myers* is very nearly decisive of the issue you have raised. *Myers* holds that the President's constitutional duty does not require him to execute unconstitutional statutes; nor does it require him to execute them provisionally, against the day that they are declared unconstitutional by the courts. He cannot be required by statute to retain postmasters against his will unless and until a court says that he may lawfully let them go. If the statute is unconstitutional, it is unconstitutional from the start.

I wish to add a cautionary note. The President has no "dispensing power." If he or his subordinates, acting at his direction, defy an Act of Congress, their action will be condemned if the Act is ultimately upheld. Their own views regarding the legality or desirability of the statute do not suspend its operation and do not immunize their conduct from judicial control. They may not lawfully defy an Act of Congress if the Act is constitutional. This was the teaching of a near sequel of *Myers, Humphrey's Executor* v. *United States,* 295 U.S. 602 (1935); and it is a proposition that was implicit in many,prior holdings. In those rare instances in which the Executive may lawfully act in contravention of a statute, it is the Constitution that dispenses with the operation of the statute. The Executive cannot.

Question 4: What is the specific authority (if any) deriving from opinions of the Attorneys General which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

The formal opinions of my predecessors in this Office establish with clarity the general principles upon which this Department continues to rely in dealing with real or apparent conflicts between Acts of Congress and the Constitution. *See, e.g.,* 40 Op. Att'y Gen. 158, 160, and opinions cited therein. As I have already said, I support those opinions fully. All of them emphasize our paramount obligation to the Acts of Congress. None of them concludes that the Executive must enforce and defend every Act of Congress in every conceivable case, the requirements of the Constitution notwithstanding.

Question 5: What is the specific authority (if any) deriving from express language in statutes or their legislative history which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

The statutes that define the Office of the Attorney General require him to render opinions upon questions of law, and they require him to conduct litigation in which the United States is interested. None of the statutes either requires or forbids him to inquire into the constitutionality of statutes.[3] As I have said, the traditional opinion has been that the Attorney General, in the due performance of his constitutional function as an officer of the United States, must ordinarily defend the Acts of Congress. As I have said, I subscribe fully to that position.

Question 6: What is the specific authority (if any) deriving from historic practice prior to the current Administration which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

*Marbury* v. *Madison,* 1 Cranch 137 (1803), was probably the first case in which the Executive made no effort to defend an Act of Congress on a constitutional point. President Jefferson was strongly of the view that Congress had no power to give the Supreme Court (or any other court) authority to control executive officers through the issuance of writs of mandamus. *See* 1 Warren, The Supreme Court in United States History 232, 242–43 (1922). When Mr. Marbury and the other "midnight judges" initiated an original action in the Supreme Court to compel delivery of their commissions, President Jefferson's Attorney General, Levi Lincoln, made no appearance in the case except as a reluctant witness. *See* 1 Cranch 143–44. No attorney appeared on behalf of Secretary Madison. The Court ultimately resolved the case by agreeing and disagreeing with President Jefferson. The Court held that the relevant statute was unconstitutional to the extent that it attempted to give the Supreme Court power to issue writs of mandamus against executive officers, but that there was no general principle of law that would prevent Congress from giving that power to the lower courts.

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[3] Quite apart from the provisions of any statute prescribing the duties or the authority of the Attorney General, the Constitution itself provides that the President "may require the Opinion in Writing, of the principal Officer in each of the executive Departments upon any subject relating to the Duties of their respective Offices." U.S. Const. Art. II, § 2, cl. 1.

A second significant historical incident involving a refusal by the Executive to execute or defend the Acts of Congress on constitutional grounds arose during the administration of Andrew Johnson. In defiance of the Tenure in Office Act, which he deemed to be unconstitutional, President Johnson removed his Secretary of War. This action provided the legal basis for one of the charges that was lodged against him by his opponents in the House; and during his subsequent trial in the Senate, the arguments offered by counsel on both sides provided an illuminating discussion of the responsibilities of the Executive in our constitutional system. *See* 2 Trial of Andrew Johnson 200 (Washington 1868). President Johnson was acquitted by one vote.

I will mention a third incident that illustrates an interesting variation on the historical practice. In the midst of World War II, as a result of the work of the House Committee on Un-American Activities, Congress provided, in a deficiency appropriations act, that no salary or compensation could be paid to certain named government employees. These individuals had been branded in the House as "irresponsible, unrepresentative, crackpot, radical bureaucrats." The Executive responded to the statute by taking two courses at once. The Executive enforced the letter of the statute (by not paying the salary of the employees in question), but joined with the employees in a legal attack upon the constitutionality of the relevant provision. When the case came before the Supreme Court, an attorney was permitted to appear on behalf of Congress, as *amicus curiae,* to defend the statute against the combined assault. The Court struck the relevant provision, holding that it was a bill of attainder, and allowed the employees to recover. *United States* v. *Lovett,* 328 U.S. 303 (1946).

Altogether, there have been very few occasions in our history when Presidents or Attorneys General have undertaken to defy, or to refuse to defend, an Act of Congress. Most of the relevant cases are cited either in the foregoing discussion or in the answers that the Senate Legal Counsel has provided to you in response to these same questions.

Question 7: What is the specific support (if any) expressed in any scholarly article or book for the Justice Department's assertion that it can deny the validity of Acts of Congress?

A helpful scholarly discussion of this problem, together with citations to other works, may be found in Edward Corwin's book on the Presidency. Taking full advantage of his scholarly prerogative, Corwin ignores the teaching and, indeed, the holding of *Myers* and concludes that the President, even though he may doubt the constitutionality of a statute, "must promote its enforcement by all the powers constitutionally at his disposal unless and until enforcement is prevented by regular judicial process." 2 E. Corwin, The President, Office and Powers, 1887–1957, 66 (4th rev. ed. 1957).

Question 8: What is the specific authority (if any) deriving from ethical pronouncements which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

The "ethical" obligations that devolve upon the Attorney General as a member of the legal profession cannot enlarge or contract his duties as an officer of the United States. There is nothing in my obligation to my profession or to the courts that prevents me from discharging my duty either to defend the Acts of Congress or to question them in the rare cases in which that is appropriate.

Question 9: What specific instances are there in which a court or bar association has expressly asserted an ethical duty for government litigators to inquire into the validity of Acts of Congress?

I know of no decision by a court or a bar association that expressly asserts that government litigators have an *ethical* duty either to inquire into the validity of Acts of Congress or to defend them.

Question 10: Has the Justice Department ever sought from Congress legislation to deal with any asserted ethical problem in litigation concerning the validity of Acts of Congress?

No.

Question 11: Has there been any relevant change in the ethical rules in the past few years, since the Justice Department has first begun denying the validity of Acts of Congress?

I know of no recent change in any ethical rule that relates to this problem. Your question assumes that the Justice Department has some new policy in this field. From what I have said in response to your questions, and from the historical examples I have given, I hope it is clear that we have no new policy. Our policy is an old one.

Sincerely,
BENJAMIN R. CIVILETTI

# Authority of the Secretary of the Treasury Under the New York City Loan Guarantee Act of 1978

The authority of the Secretary of the Treasury to issue guarantees under the New York City Loan Guarantee Act of 1978, P.L. No. 95-339 and P.L. No. 95-415, was not affected by a rider in the Senate appropriation bill, H.R. 7631, under § 101(a)(3) of the Continuing Appropriations Resolution, P.L. No. 96-369, 94 Stat. 1351.

Section 101(a)(3) of the Continuing Appropriations Resolution was intended to distinguish between matters considered by both the Senate and the House of Representatives in their appropriations bills, for which the more restrictive of the two provisions on an agency's authority is to govern, and matters considered by only one House in its appropriations bill, for which the authority and conditions of FY 1980 appropriations are to govern.

The restriction on the Secretary of the Treasury's authority to issue guarantees under the New York City Loan Guarantee Act of 1978 is found only in the Senate version of the appropriations bill pertaining to the New York City Loan Guarantee program and had not been considered by the House of Representatives; therefore, the Senate rider did not operate (under § 101(a)(3) of the Continuing Appropriations Resolution) to restrict the Secretary's authority to issue New York City loan guarantees.

The Attorney General does not have the authority to issue opinions on questions arising out of a business transaction between a private person and the government when the private person has insisted on receiving an Attorney General opinion for his benefit and the requesting department head has no real concern about the question.

The Attorney General will issue opinions related to business transactions between the government and private persons only when the transaction raises a substantial and genuine issue of law arising in the administration of a Department.

October 2, 1980

THE SECRETARY OF THE TREASURY

MY DEAR MR. SECRETARY: You have asked my opinion whether a rider contained in the Senate-passed version of H.R. 7631, concerning administrative funds for the New York City Loan Guarantee program, affects your authority to issue guarantees pursuant to the New York City Loan Guarantee Act of 1978, Pub. L. Nos. 95-339 and 95-415. For reasons elaborated below, I conclude that the rider in question has not taken effect, and therefore does not restrict your authority under the Guarantee Act.

In pertinent part, H.R. 7631, as passed by the Senate, provided:

> For necessary administrative expenses as authorized by the New York City Loan Guarantee Act of 1978 (Public Law 95-415), $922,000: *Provided, That none of these funds*

> ***may be used to administer programs to issue loan guarantees to New York City for the purpose of permitting the Municipal Assistance Corporation to use the proceeds of its borrowings in fiscal years 1981 and 1982 to meet the City's financing needs after fiscal year 1982.***

The italicized language is the rider, which was a committee amendment. 126 Cong. Rec. S 12,589 (daily ed. Sept. 15, 1980). There is no provision similar to the rider in the House-passed version of the bill.

As fiscal year 1980 drew to a close, there was no opportunity for the normal conference procedure to resolve differences between the bills, and Congress found it necessary to provide continuing appropriations through H.J. Res. 610 for a number of agencies having pending appropriations. For agencies whose appropriations had passed both Houses, the Resolution provides as follows, in § 101(a)(3):

> Whenever the amount which would be made available or the authority which would be granted under an Act listed in this subsection as passed by the House as of October 1, 1980, is different from that which would be available or granted under such Act as passed by the Senate as of October 1, 1980, the pertinent project or activity shall be continued under the lesser amount or the more restrictive authority: *Provided,* That where an item is included in only one version of an Act as passed by both Houses as of October 1, 1980, the pertinent project or activity shall be continued under the appropriation, fund, or authority granted by the one House, but at a rate for operations not exceeding the current rate or the rate permitted by the action of the one House, whichever is lower, and under the authority and conditions provided in applicable appropriation Acts for the fiscal year 1980.

The apparent purpose of § 101(a)(3) is to distinguish between matters considered by both Houses, for which the more restrictive of the two provisions is to govern, and matters considered by only one House, for which "authority and conditions" are to revert to those found in fiscal year 1980 appropriations.

Because the rider is found only in the Senate version of the underlying 1981 appropriations bill, and the issue of restricting the mode of administering New York City loan guarantees was not taken up in the House, § 101(a)(3) of H.J. Res. 610 specifies that the rider falls within the proviso as an "item included in only one version of an Act." Therefore, it is superseded by the "authority and conditions" found in applicable 1980 appropriations.

This reading of the resolution is confirmed by the following explanation provided by the Managers in the Conference Committee Report on H.J. Res. 610:

> The Committee of Conference agrees that, for the purposes of this resolution in interpreting the language contained in Section 101(a)(3) concerning restrictive authority included in only one version of an Act as passed by the House and Senate, the restrictive authority, as it applies to the proviso concerning the New York City Loan Guarantee Program, contained in the 1981 HUD Independent Agency Appropriation Act, must have been carried in the applicable Appropriation Act for Fiscal Year 1980, before it is operative in Fiscal Year 1981.

The rider was "included in only one version of an Act" within the meaning of the proviso to § 101(a)(3), and was therefore, by the terms of the proviso, superseded by the applicable appropriation act for fiscal year 1980, which contains no such limitation. I therefore conclude that the rider has not taken effect, and does not restrict your authority in administering the Guarantee Act.*

Sincerely,
BENJAMIN R. CIVILETTI

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*As you know, Attorney General Elliot Richardson adopted the formal policy on October 1, 1973, of not issuing opinions regarding the validity of guarantees or other obligations issued by federal agencies unless the opinion request raises a genuine issue of law. Successive Attorneys General, including myself, have adhered to this policy. In addition, Attorneys General have opined that they do not have the authority to issue opinions when it is apparent that the request has been made, not because the requestor has any real concern about his authority, but because private persons, who engage in transactions with the United States, have insisted upon such an opinion for their benefit. 39 Op. Att'y Gen. 11, 17–19 (1937); 20 Op. Att'y Gen. 463, 464 (1892). Because your request raises a genuine issue of law, I believe that an Attorney General's opinion on the narrow issue presented is appropriate. I am also persuaded that this is a legal issue over which you have a serious concern and, for that reason, I believe I have the authority to issue this opinion. I am troubled, however, by the insistence of private lawyers involved in the New York guarantee transaction on receiving an Attorney General opinion addressing this question. I ask you to inform private persons who transact business with your department that the Attorney General will not issue opinions solely because they feel it is important to protect them or guide them in their transactions, and that opinions related to business transactions with the government will be issued only when the transaction raises a substantial and genuine issue of law arising in the administration of a department.

# Standards for Closing a Meeting of the Select Commission on Immigration and Refugee Policy

**The Select Commission on Immigration and Refugee Policy is subject to the requirements of the Federal Advisory Committee Act, which provides that advisory committee meetings may be closed to the public only upon a determination that one or more of the exemptions of the Government in the Sunshine Act is applicable.**

**The December 1980 meeting of the Commission may not be closed in its entirety for national security and foreign policy reasons, insofar as it deals with matters not relating to those issues; the spirit of the Federal Advisory Committee Act requires that the meeting agenda be structured so that classified and other exempt information is considered separately from the main, and congressionally mandated public, policy discussions and decisionmaking activities of the Commission.**

October 10, 1980

THE CHAIRMAN OF THE SELECT COMMISSION ON
IMMIGRATION AND REFUGEE POLICY

MY DEAR MR. CHAIRMAN: This is in response to your letter of September 2, 1980, concerning the possibility of closing the December meeting of the Select Commission on Immigration and Refugee Policy for national security and foreign policy reasons. I do not believe that the meeting, in its entirety, may properly be closed on that ground to the extent it deals with matters not relating to those issues, e.g., enforcement matters.

The Commission is an "advisory committee" as that term is defined in § 3(2) of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. I. It is subject to the requirements of the Act. Under FACA § 10(a)(1), advisory committee meetings must be open to the public unless closed pursuant to § 10(d). Section 10(d) permits closure of "any *portion* of an advisory committee meeting where the President, or head of the agency to which the Committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of § 552b of Title 5 (Government in the Sunshine Act)" (emphasis added). Thus an advisory committee meeting may be closed only upon determination by an appropriate official [1] that one or more of the ten open-meeting exemptions of the Government in the Sunshine Act is applicable. The determination must be in writing. Further, only those portions of the meeting to which the exemption relied upon is relevant may be closed; the remainder of the meeting must be open.

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[1] Either "the President or head of the agency to which the [Commission] reports." For the Commission, the President and the "agency head" are identical. However, the President has delegated his functions under FACA to the Administrator of General Services, Executive Order No. 12024, § 2,

You give examples of the types of issues to be discussed at the December meeting and state your belief that full consideration of those issues may involve sensitive national security and foreign policy information. You conclude, based on this, that the meeting should be closed in order to permit the participants "to feel free to talk directly, concretely, and confidentially on issues which vitally affect the formation of immigration and refugee policy."

Under applicable legal standards, only those portions of advisory committee meetings "likely to disclose matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy *and* (B) in fact properly classified pursuant to such Executive order," 5 U.S.C. § 552b(c)(1) (emphasis added), may be closed for those reasons. It is, of course, possible that the Commission, during its deliberations, might need to consider particular information related to national defense or foreign policy that has been properly classified (under the standards of Executive Order No. 12065) by an official with classification authority. If so, that portion of the meeting in which the particular information is proposed to be discussed may be closed (with advance notice) under the procedures of FACA § 10(d) and OMB Circular A-63, as amended. It does not appear, however, that the entire December meeting may be closed based on the speculation that a free-form exploration of issues related to immigration policy might require that some classified information be disclosed. The spirit of FACA requires that the meeting agenda be structured so that classified and other exempt information is considered separately from the main, and congressionally mandated public, policy discussions and decisionmaking activities of the Commission, unless such structuring is impossible. I doubt that it would be impossible in the case of the December meeting.

Should you believe that a portion of the December meeting must be closed so that the Commission may consider specific classified information, you should seek the assistance of the Committee Management Secretariat of the General Services Administration in arranging for the closure.

Sincerely,
BENJAMIN R. CIVILETTI

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who would be the appropriate official to make closing determinations with respect to meetings of the Commission.

# OPINIONS

OF THE

# ATTORNEY GENERAL OF THE UNITED STATES AND OF THE OFFICE OF LEGAL COUNSEL

RELATING TO

# THE IRANIAN HOSTAGE CRISIS

November 7, 1979, through February 5, 1981

# INTRODUCTION AND SUMMARY

On November 4, 1979, at about 10:30 a.m. local time, several hundred militant demonstrators overran the United States embassy compound in Tehran, Iran, and took 63 American citizens hostage. Thus began what one court later described as "a foreign policy crisis of the gravest proportions," *American International Group, Inc.* v. *Islamic Republic of Iran,* 657 F.2d 430, 433 (D.C. Cir. 1981). During the next 444 days, before the final release of the 52 American citizens still held hostage, the United States government responded to rapidly changing events by drawing upon virtually every lawful political and economic measure available to it. These included the declaration of a national emergency, the proclamation and enforcement of an international "freeze" of nearly $6 billion of Iranian assets, contentious litigation against Iran before the International Court of Justice, participation in wide-ranging domestic litigation involving the frozen assets, and an unsuccessful attempt to rescue the hostages by military force. These events culminated on January 19, 1981, in the initialing by the United States and the Islamic Republic of Iran of a complex series of international agreements principally set out in two declarations of the Democratic and Popular Republic of Algeria, the nation which had served as the intermediary during their negotiation. Those agreements, the so-called Algiers Accords, authorized the freeing of the hostages the following day and the creation of an international arbitral tribunal to resolve certain claims outstanding between the two governments and their citizens in exchange, *inter alia,* for the release of the frozen Iranian assets.

The extraordinarily broad range of legal questions raised and resolved during the course of the Iranian Hostage Crisis makes it a seminal legal event, unique in our Nation's history, whose domestic and international repercussions will be felt for years to come. In the area of domestic law, the Hostage Crisis raised complex questions relating to the President's constitutional authority to conduct foreign affairs and the President's statutory authority to take emergency measures in times of crisis, questions that "touch fundamentally upon the manner in which our Republic is to be governed," *Dames & Moore* v. *Regan,* 453 U.S. 654, 659, (1981). In the area of international and foreign relations law, the Hostage Crisis raised in rapid succession more issues than any other political event in recent memory—regarding extraterritoriality, treaty law, extradition, deportation, recognition, state succession, foreign sovereign immunity, the act of state doctrine, the permissible use of force under international law, the legality of various nonmilitary reprisal measures, diplomatic and consular rights and immunities, and practice and procedure before the International Court of Justice.

The 25 legal opinions that follow, issued over the 15-month period that encompassed the Hostage Crisis, address most of these domestic and international legal issues. These opinions were prepared by the Office of Legal Counsel (OLC) in carrying out its assigned function of assisting the Attorney General in the performance of his functions as chief legal adviser to the President and the Cabinet.[1] Two of these opinions were issued as formal opinions of the Attorney General. Although not all of these opinions were issued in 1980, we have chosen to publish them together in the 1980 volume, both to preserve for the reader the continuity of the historical events to which they relate, and to illustrate the complex interrelationship between their numerous issues of private and public, domestic and international law. The following account of historical events is intended to illustrate the factual background of each of these opinions, to illuminate their relationship to one another, and to indicate whether and how the issues discussed in them were later resolved through domestic or international litigation.

### A. Background of the Seizure

For 30 years after World War II, the governments of Iran and the United States encouraged the development and growth of commercial relationships between their two countries under a network of formal agreements that included the 1955 Treaty of Amity, Economic Relations, and Consular Rights, United States-Iran, Aug. 15, 1955, 8 U.S.T. 899, T.I.A.S. No. 3853, 284 U.N.T.S. 93 (Treaty of Amity). Pursuant to these international agreements, the Iranian government, headed by Shah Mohammed Reza Pahlavi, adopted national development plans designed to attract United States companies to invest in wholly owned Iranian companies or joint ventures. The Shah's government granted oil concessions to American companies, developed a substantial military force, borrowed extensively from United States banks, and contracted with numerous private American contractors. Iran financed much of its ambitious program of industrial modernization through oil exports, which by 1978 amounted to more than 5 million barrels per day, or more than $20 billion per year in foreign exchange. *See* Staff of the

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[1] See 28 U.S.C. §§ 510, 512, 513 (1982); 28 C.F.R. § 0.25(a) (1984). The opinions published here represent only the most visible portion of the Office of Legal Counsel's total work product relating to the Hostage Crisis. In addition to these formal opinions, the Office was called upon throughout the Hostage Crisis to render informal written and oral legal advice that was never reduced to final opinion form, as well as to assist in the research, drafting, and editing of numerous other legal documents produced by the United States government.

Joint Economic Comm., 96th Cong., 1st Sess., *Economic Consequences of the Revolution in Iran* 111 (Comm. Print 1980).

In 1978, however, relations between the two countries became strained. Within Iran, political opposition to the Shah's regime grew and civil strife became increasingly frequent. In January 1979, after weeks of angry demonstrations directed against both the United States and the Shah's government, the Shah—his health failing—fled Iran and sought refuge successively in Egypt, Morocco, the Bahamas, Mexico, and, finally, the United States. Within two weeks of the Shah's departure, the Ayatollah Ruhollah Khomeini, a fundamentalist Islamic leader living in exile in France, returned to Iran and became its *de facto* ruler.

On November 4, 1979, shortly after the deposed Shah arrived in New York to receive medical treatment, armed Iranian demonstrators attacked the United States embassy compound in Tehran, seized embassy property and archives, and took hostage all United States diplomatic and consular personnel present. Although the militants purported to act in a private capacity, the Ayatollah's government implicitly endorsed the seizure by its failure to respond to it. Within hours of the seizure, the Office of Legal Counsel was asked by the Attorney General, on an urgent basis, to identify, consider, and resolve various legal issues associated with the seizure.

## B. The Assets Freeze and the Trade Embargo

On November 7, 1979, three days after the seizure of the United States embassy in Tehran, the Office of Legal Counsel (OLC) sent the Attorney General an opinion concerning "Presidential Powers Relating to the Situation in Iran." That opinion reached four conclusions: (1) that the President was authorized to block all assets of Iran and Iranian nationals in the United States upon the declaration of a national emergency pursuant to the International Emergency Economic Powers Act, (codified at 50 U.S.C. §§ 1701-1706 (Supp. III 1979)) (IEEPA);[2] (2) that even without declaring such an emergency, the President could, under the Export Administration Act of 1979, 50 U.S.C. app. §§ 2401 *et seq.* (Supp. III 1979) (EAA), prohibit or curtail the export of goods and technology subject to the jurisdiction of the United States in a situation such as this, where American national security and stated foreign policy goals were threatened; (3) that under international law, the United States was entitled to restrict the movement of Iranian diplomatic and consular personnel in the United States and to take appropriate nonforcible reprisal actions against them; [3] and (4) that the President not only possessed the constitutional power to send troops to aid American citizens abroad, but also that his use of this power was not necessarily constrained in these circumstances by the consultation and reporting provisions of the War Powers Resolution, 50 U.S.C. §§ 1541–1548 (1976) (WPR).

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[2] In passing, the opinion expressed the view that § 207(b) of IEEPA, 50 U.S.C. § 1706(b) (Supp. III 1979), which authorizes Congress to terminate the exercise of the President's emergency authority by a concurrent resolution not submitted to the President pursuant to Article I, § 7 of the Constitution, was unconstitutional. Three and one-half years later, the Supreme Court held all such "legislative veto" provisions unconstitutional. *See INS* v. *Chadha*, —— U.S. ——, 103 S. Ct. 2764 (1983).

[3] The opinion cautioned, however, that absent a declaration of war, the President lacked statutory authority to intern or expel Iranian nationals.

On November 11, 1979, OLC expanded upon these initial conclusions in an opinion for the Attorney General entitled "Supplementary Discussion of the President's Power Relating to the Seizure of the American Embassy in Iran." That opinion concluded that although under the Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, Apr. 18, 1961, 500 U.N.T.S. 95, 23 U.S.T. 3227, Iranian diplomats in the United States were not liable to any form of arrest or detention, this prohibition could possibly be mitigated by placing those diplomats in protective custody; by restricting their movements as a reciprocal response to the restrictions placed on the movements of the American diplomats in Tehran; by suspending the operation of the Convention on the ground that Iran had materially breached its treaty obligation to protect the United States embassy and its diplomats; or by restricting Iranian diplomatic movements as a nonforcible reprisal for Iran's massive treaty violations. Second, the opinion reviewed the provisions of the WPR and concluded that, while only the legislative veto provision of the WPR, 50 U.S.C. § 1544(c), was facially unconstitutional, *cf.* note 2, *supra,* the consultation and reporting requirements of the WPR might also be applied in ways that would unconstitutionally interfere with the President's power as Commander-in-Chief. *See* U.S. Const., Art. II, § 2, cl. 1.[4] Finally, the opinion outlined the detailed steps that the President would have to take to issue immediately a lawful executive order under IEEPA blocking Iranian assets in the United States.

On November 12, acting on national security grounds under § 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862 (1976 & Supp. III 1979), President Carter ordered the discontinuation of all oil purchases from Iran for delivery to the United States in a proclamation that was drafted and issued with the Office of Legal Counsel's assistance. Two days later, apparently in anticipation of a United States assets freeze, Iran announced its intent to withdraw all of its funds from American banks and their overseas branches and to transfer them to other countries. *See* N.Y. Times, Nov. 15, 1979, § A, at 1, col. 5. On the same day, President Carter declared a national emergency pursuant to IEEPA and the National Emergencies Act, 50 U.S.C. §§ 1601–1651 (1976 & Supp. III 1979), and by executive order blocked the removal and transfer of "all property and interests in property of the Government of

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[4] The Office of Legal Counsel later expanded upon its analysis of the WPR in a February 12, 1980, opinion for the Attorney General, which preceded the American attempt to rescue the hostages by force. That opinion is discussed in greater detail in Part F, *infra.*

Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States or which are in or come within the possession or control of persons subject to the jurisdiction of the United States." "Blocking Iranian Government Property," Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1979), *reprinted in* 50 U.S.C. § 1701 note (Supp. V 1981).[5] In retaliation, Abolhassan Bani-Sadr, the Acting Foreign Minister of Iran, announced the following day, November 15, that all American assets in Iran had been nationalized.

Executive Order No. 12,170 froze all assets located in the United States, or in the possession of persons subject to United States jurisdiction, in which the government of Iran or any of its instrumentalities had any interest. The freeze had an extraterritorial aspect, since it not only purported to reach Iranian deposits held in banks located in the United States, but also Iranian dollar deposits held in the overseas branches of United States banks.[6] The freeze did not extend, however, to assets owned entirely by private Iranian citizens.

Six days later, on November 21, 1979, OLC sent to the Attorney General an opinion entitled "Presidential Implementation of Emergency Powers under the International Emergency Economic Powers Act." That opinion examined the President's authority under IEEPA to act not only with respect to foreign government property, but also to limit or prohibit the transfer of property subject to United States jurisdiction in which any foreign national had an interest. *See* 50 U.S.C. § 1702(a) (Supp. III 1979). The opinion concluded that the President was entitled to issue a single executive order invoking the remainder of his powers under IEEPA in response to the situation in Iran, and thereby to effectuate a complete trade embargo against Iran by blocking the property of Iranian citizens as well as that of their government.[7]

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[5] According to one account, a Treasury Department watch officer read a French wire service transmission at 4:45 A.M. on November 14, 1979, which stated that Iran was planning imminently to withdraw its assets from American banks. After determining that no such withdrawals had yet been made, Treasury Secretary William Miller woke President Carter at 5:45 A.M. and recommended that the President sign the executive order. The order was signed at 8:00 A.M. *See Escalating the Iranian Drama*, Bus. Wk., 31 (Nov. 26, 1979).

Drafting of the executive order had actually begun several days earlier. Although primary drafting responsibility for this and later executive orders was located in the Department of the Treasury, the Office of Legal Counsel played a role in drafting this order as well as all subsequent executive orders issued to deal with the Hostage Crisis. The Office of Legal Counsel also performed its customary role of reviewing this executive order prior to its execution both as to form and legality. *See* 28 C.F.R. § 0.25(b) (1984); § 2(b) & (c) of Exec. Order No. 11030, 27 Fed. Reg. 5847 (1962) (delegating this authority to the Assistant Attorney General, Office of Legal Counsel).

[6] A number of American banks proceeded to engage in major litigation in French, English, and German courts over the extraterritorial effect of the President's freeze order. That litigation was ultimately mooted in January 1981 by the conclusion of the Algiers Accords. *See generally* Hoffman, *The Iranian Assets Litigation*, Private Investors Abroad—Problems and Solutions in International Business in 1980 at 329, 343–46, 356–60 (1980). Fourteen days after the freeze went into effect, the United States Government informed the International Monetary Fund (IMF) of its action, and thereafter took the position that the extraterritorial application of the freeze order was not invalid under international law because it comported with Art. VIII, §§ 2(a) & (b) of the Articles of Agreement of the IMF as amended, Apr. 1, 1978, 29 U.S.T. 2203, T.I.A.S. No. 89372. *See generally* Edwards, *Extraterritorial Application of the U.S.-Iranian Assets Control Regulations*, 75 Am. J. Int'l L. 870 (1981).

Before invoking the option of unilateral trade sanctions, however, the United States first tried and failed to secure multilateral economic sanctions against Iran through the United Nations. After waiting for a number of months to avoid complicating possible negotiations for the release of the hostages, on April 7, 1980, President Carter again invoked his emergency powers under § 203 of IEEPA, 50 U.S.C. § 1702 (Supp. III 1979), and § 301 of the National Emergencies Act, 50 U.S.C. § 1631 (1976), to impose a broad ban on all exports to Iran by any person subject to United States jurisdiction, as well as on any new service contracts and certain financial transactions. *See* "Prohibiting Certain Transactions with Iran," Exec. Order No. 12,205, 45 Fed. Reg. 24,099 (1980), *reprinted in* 50 U.S.C. § 1701 note (Supp. V 1981).

An opinion sent by the Office of Legal Counsel to the Attorney General shortly thereafter, entitled "Legality of Certain Nonmilitary Actions Against Iran" (April 16, 1980), discussed the legality of ten nonmilitary sanctions that could be applied against Iran. The opinion concluded that IEEPA plainly authorized the President to impose an embargo on all imports from Iran, and to order the closure of offices located in the United States of both private Iranian businesses and Iranian government instrumentalities. This opinion also found that, subject to certain conditions, IEEPA authorized the President to prohibit commercial exports of food and medicine to Iran, and that, at least with respect to food exports, that statutory authority could be supplemented by invocation of the EAA. The opinion advised that IEEPA authorized the President broadly to prohibit all transactions between Americans relating to Iran, so long as the transactions were not "purely domestic" and Iran had at least an indirect interest in them. In addition, the opinion found no bar to the United States government's diversion of equipment from suspended foreign miltiary sales contracts between Iran and the United States, most of which had already been either suspended or cancelled by Iran.

The April 16 opinion was more equivocal, however, with respect to five other possible nonmilitary options. Two major unresolved questions under IEEPA were whether, and to what extent, the statute authorized "secondary boycotts," i.e., actions directed against foreign countries or nationals of countries other than the country which had created the national emergency. Under the circumstances here, the opinion concluded, IEEPA could be supplemented by the President's inherent constitutional authority respecting foreign affairs and the so-called "Hostage Act of 1868," Act of July 27, 1868 ch. 249, 93, 15 Stat. 223 (codified at 22 U.S.C. § 1732 (1976)).[8] If supplemented by these sources, the opinion concluded, subject to applicable bilateral aviation treaties and maritime statutes, IEEPA might authorize certain secondary boycotts against those trading with Iran through, for example, denial of landing rights or fuel purchases in the United States to foreign airlines serving Iran, or denial of access to United States ports or fueling facilities to vessels or companies serving Iran.

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[7] The opinion further concluded that because such an order could be based upon an ongoing national emergency, a new declaration of emergency was unnecessary; that such an order need not be accompanied by an immediate report to Congress; and, that the President could delegate to the Secretary of the Treasury the discretionary exercise of all powers necessary to implement the order. In fact, since November 1979 the President has periodically issued notices of the continuance of the national emergency in connection with his reports on the activities of the Iran-United States Claims Tribunal. *See, e.g.*, 50 U.S.C. § 1701 note (Supp. V 1981) (notice of Nov. 12, 1980, continuing national emergency); 20 Weekly Comp. Pres. Doc. 640 (May 3, 1984) (same). As of this writing, the national emergency declared on November 14, 1979, is still in effect. *See* Part K, *infra*.

The opinion also concluded that, while neither the Communications Satellite Corporation (COMSAT) statute, 47 U.S.C. § 731 (1976), nor the Hostage Act clearly authorized the President to block international satellite communications from Iran to the United States, *indirect* restrictions on satellite communications might be lawful. Thus, the opinion suggested, restraints could be imposed upon satellite communications from Iran via United States-based satellite ground stations, if those restraints were part of a more general ban on all transactions with Iran. The opinion expressed serious concerns, however, that any blocking action would implicate First Amendment concerns by infringing upon United States citizens' rights to receive ideas from abroad.[9] Similarly,

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[8] This provision, also known as the "Citizens in Foreign States Act," states in pertinent part that "[w]henever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government . . . , the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release" of such citizen.

The Hostage Act had previously been mentioned in passing as a possible source of presidential statutory authority in a January 8, 1980 OLC opinion to the Attorney General entitled "Presidential Power Concerning Diplomatic Agents and Staff Personnel of the Iranian Mission," discussed in Part D, *infra.* The Act was also discussed in some detail in the Supreme Court's decision regarding the President's constitutional and statutory authority to conclude and implement the Algiers Accords. *See Dames & Moore* v. *Regan,* 453 U.S. 654, 675–78 (1981), discussed in Part J, *infra.*

[9] In an earlier opinion, dated December 27, 1979 and entitled "The President's Authority to Take Certain Actions Relating to Communications From Iran," The Office of Legal Counsel had examined in greater detail the First Amendment issues raised by executive action that would have the effect of prohibiting the importation of certain types of television messages or transmissions from Iran. This opinion concluded that the President has statutory and constitutional authority, subject to First Amendment limitations, to limit selectively or to embargo altogether video or audio communications from Iran which might aggravate the Hostage Crisis. The opinion also suggested that the President might exercise that authority either unilaterally or in compliance with United Nations Security Council sanctions under Article 41 of the United Nations Charter (1977 Y.B.U.N. 1181).

At the same time, however, the opinion recognized that the First Amendment requires that any executive action taken to limit communications from Iran be narrowly tailored and sweep no more broadly than the underlying justification required. A noncontent-based restriction that severed all communications links with Iran, the opinion suggested, would be subject to less exacting First Amendment scrutiny than a more limited restriction based in whole or in part on the contents of the communications.

In his December 27, 1979, cover memorandum transmitting this opinion to the Attorney General, Acting Assistant Attorney General Larry A. Hammond cautioned that "two critical points . . . may not have emerged with sufficient prominence from this memorandum." These were:

> First, the precise factual details of any proposed program are critically important, and we will need to be cautious about giving advice either to the State Department or to interested people at the White House until the facts and the supporting rationale have

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the opinion suggested that access to the Satellite Communications Systems of the International Telecommunications Satellite Organization (INTELSAT) could be denied, so long as that action were taken in accordance with the terms of the Agreement Relating to the International Telecommunications Satellite Organization (INTELSAT Agreement), Aug. 20, 1971, 23 U.S.T. 3813, T.I.A.S. No. 7532. Finally, the opinion held that, under stated conditions, the President could limit travel by American citizens to Iran at particular times, but that the First Amendment might limit the exercise of that statutory authority with respect to journalists.[10]

On the following day, April 17, 1980, President Carter issued Executive Order No. 12,211, 45 Fed. Reg. 26,685 (1980), *reprinted in* 50 U.S.C. § 1701 note (Supp. V 1981), entitled "Prohibiting Certain Transactions With Iran." That order amended the export ban issued 10 days earlier to include a broad ban on Iranian imports. Consistent with the recommendations in the April 16, 1980 OLC opinion, the executive order forbade all direct or indirect imports of Iranian goods and services into the United States, other than news broadcasts or publication materials; broadened the prohibition against financial payments in, or financial transfers to persons within, Iran; prohibited travel-related transactions with Iran and authorized the Secretary of State to restrict the use of United States passports for travel to, in, or through Iran for all except Iranian citizens and journalists; and revoked existing licenses for transactions with Iran Air, the National Iranian Oil Company, and the National Iranian Gas Company.

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> been carefully considered. Second, it is important not to lose sight of the fact that any action regulating the content of national television or radio news is virtually unprecedented. Actions in this area will be seen as affecting "pure speech" in a way that may impose more serious burdens than we encountered in regulating, for instance, the Iranian student demonstrations.

Memorandum from Larry A. Hammond, Acting Assistant Attorney General, Office of Legal Counsel, to the Attorney General (December 27, 1979).

[10] Subsequently, the Supreme Court twice took up the issue of the President's authority to limit the use of United States passports and international travel by American citizens. In *Haig* v. *Agee*, 453 U.S. 280 (1981), the Court upheld a regulation issued pursuant to the Passport Act, 22 U.S.C. § 211a (1976 & Supp. III. 1979), granting the Secretary of State broad discretion to revoke passports on national security or foreign policy grounds. In *Agee*, the Government had charged that a former CIA employee had offered to assist the Iranian captors of the American hostages in analyzing seized CIA documents. *See* Br. for the Petitioner 6–7, *Haig* v. *Agee*, 453 U.S. 280 (1981).

In *Regan* v. *Wald*, —— U.S. ——, 104 S. Ct. 3026 (1984), the Court held that the grandfather clause of IEEPA, Pub. L. No. 95–223, § 101(b), 91 Stat. 1625 (1977), preserved the President's authority under § 5(b) of the Trading with the Enemy Act of 1917, 50 U.S.C. app. § 5(b) (1976 & Supp. V 1981), to restrict travel-related economic transactions with Cuba. In *Regan*, the Treasury had issued an assets control regulation in 1982 that narrowed the terms of a general license for travel to Cuba that had been issued 5 years earlier. In addition to finding the regulation statutorily authorized, the Court held that, in light of the traditional judicial deference paid to executive judgment in the realm of foreign policy, restraints on travel-related transactions with Cuba aimed at curtailing the flow of hard currency to that country did not violate the freedom to travel protected by the Due Process Clause of the Fifth Amendment.

### C. Domestic Litigation Brought by the Islamic Republic of Iran

While the United States was imposing these trade sanctions, the government of the Islamic Republic of Iran was taking its own legal steps to collect property owned by the deposed Shah and his family. Beginning in June 1979, the Islamic Republic had embarked upon a systematic program to nationalize its banking, metal production, shipbuilding, automotive, and aircraft industries, with the aim of redistributing wealth and eliminating Iran's dependence upon foreign capital. This program had attempted to identify and nationalize all of the Shah's assets. On November 28, 1979, the Islamic Republic filed suit against the Shah and his wife in the Supreme Court of the State of New York, claiming $56 billion in damages and charging that defendants had misappropriated Iranian governmental funds for their own use. *See Islamic Republic of Iran* v. *Pahlavi*, 94 A.D.2d 374 (1983).

Assisted by the United States Attorney's Office for the Southern District of New York and the Civil Division, OLC prepared an opinion for the Acting Associate Attorney General dated January 2, 1980, concerning "Possible Participation by the United States in *Islamic Republic of Iran* v. *Pahlavi*." That opinion analyzed the Government's two principal litigation options: to request a stay or dismissal of Iran's suit without prejudice until the hostages were released, without intimating any position on the merits, or to intervene and cross-claim for relief against the Islamic Republic of Iran.

The January 2 opinion reached five conclusions: (1) that if the United States withdrew diplomatic recognition from Iran, the suit would be dismissed, but that so long as the Islamic Republic remained a government recognized by the United States, it was still entitled to maintain a lawsuit in any federal or state court of competent jurisdiction; (2) that the United States had a sufficient interest in the case, based on the impact of the litigation on its foreign policy interests, to support the United States' standing to participate in the suit in some fashion; (3) that a substantial argument could be made, based on both federal common law and state law, that the New York state court should defer to a request by the United States to refrain from adjudicating the merits, at least temporarily; (4) that the United States could, if it wished, intervene and bring unrelated cross-claims against Iran (limited, perhaps, by the value of the Shah's assets); but (5) that if the suit survived these initial procedural hurdles, a strong prospect would nevertheless exist that either the act of state doctrine or the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330(c), 1332, 1391(f), 1441(d), 1602–1611 (1976) (FSIA), would bar Iran's ultimate recovery against the Shah.

In February 1980, through their New York counsel, the Shah and Empress of Iran moved to dismiss Iran's complaint for want of personal jurisdiction, *forum non conveniens*, and as a nonjusticiable political question. After oral argument on defendants' motion to dismiss, the United States government filed a Suggestion of Interest in the action requesting that the court defer decision on the issues pending before it to avoid prejudice to the continuing United States efforts to resolve the Hostage Crisis. In response to the Suggestion of Interest, the parties agreed to a temporary adjournment.

One month after the conclusion of the Algiers Accords in January 1981, discussed in Part H, *infra,* the United States filed another Suggestion of Interest on behalf of Iran, citing ¶14 of the Algiers Accords, Declarations of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, *reprinted in* 20 I.L.M. 224 (1981). In that provision, the United States had agreed to "make known, to all appropriate U.S. courts, that in any litigation[brought by Iran in United States courts to recover the Shah's assets] the claims of Iran should not be considered legally barred either by sovereign immunity principles or by the act of state doctrine and that Iranian decrees and judgments relating to such assets should be enforced by such courts in accordance with United States law."

On September 14, 1981, the New York Supreme Court (Kirschenbaum, J.) denied defendants' motions to dismiss the complaint for want of *in personam* jurisdiction or as a nonjusticiable political question, but granted their motion to dismiss on grounds of *forum non conveniens.* That ruling was affirmed first by the Appellate Division, First Department, in June 1983, and ultimately by a 5-1 vote of the New York Court of Appeals. *See Islamic Republic of Iran* v. *Pahlavi,* 94 A.D.2d 374 (1983), *aff'd,* 62 N.Y.2d 474 (N.Y. Ct. App. 1984). The New York Court of Appeals ruled that the nexus between the plaintiff Iran and the forum, New York, was so insubstantial as to warrant a *forum non conveniens* dismissal, even in the absence of an alternative forum in which Iran could bring suit. Furthermore, the court held that the Algiers Accords did not bind either the United States government or the New York courts to guarantee the Islamic Republic an opportunity to prove its case on the merits.[11]

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[11] The suit against the Shah and the Empress was not the only domestic litigation filed by Iran seeking to recover the assets of the deposed royal family. In February 1980, the Islamic Republic of Iran filed a companion action against the Shah's sister, Ashraf Pahlavi, charging that she had violated fiduciary obligations imposed upon her by Iranian law by conspiring with the Shah to divert to her own use funds and property belonging to the government and people of Iran. Iran sought to impress a constructive trust on any and all of the defendant's assets and to enjoin their transfer.

The Shah's sister moved to dismiss on three grounds: the doctrines of *forum non conveniens,* political question, and "unclean hands." Notwithstanding a February 1981 filing of a United States' Suggestion of Interest virtually identical to that filed in the Iranian suit against the Shah and his wife, the New York Supreme Court, Special Term (Fraiman, J.), ruled in November 1982 that the suit did not present a nonjusticiable political question and was not barred by either the unclean hands doctrine or *forum non conveniens. See Islamic Republic of Iran* v. *Ashraf Pahlavi,* 116 Misc.2d 590 (1982). On appeal, the Appellate Division, First Department concluded that this case, too, should be dismissed on *forum non conveniens* grounds. Accordingly, it reversed and dismissed Iran's complaint, finding its earlier decision in the case involving the Shah's own assets controlling. *See Islamic Republic of Iran* v. *Ashraf Pahlavi,* 99 A.D.2d 1009 (1984), *cert. denied,* — U.S. — (No. 84-672, January 7, 1985).

### D. Action Against Iranian Nationals in the United States

As the events in Iran unfolded, the President took numerous other steps directed against Iranian nationals in the United States. Six days after the hostages were taken, President Carter directed the Attorney General to identify those Iranian students in the United States who were not in compliance with the terms of their entry visas and to take the necessary steps to commence deportation proceedings against them. On November 11, 1979, in consultation with the General Counsel's Office of the Immigration and Naturalization Service (INS), the Office of Legal Counsel transmitted an opinion to the Attorney General entitled "Immigration Laws and Iranian Students." That opinion concluded that the President possessed statutory authority pursuant to the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101 *et seq.* (1976 & Supp. III 1979), to halt entry of Iranians into the United States, and that, while the matter was not free from doubt, a reasonable reading of §§ 212(a)(27) & 241(a)(7) of that Act, 8 U.S.C. §§ 1182(a)(27) & 1251(a)(7) (1976 & Supp. III 1979), would also allow the Attorney General to conclude that the presence of certain Iranian aliens in the country was so "prejudicial to the public interest" and threatening to the conduct of foreign affairs as to render them deportable. It would, however, be constitutionally inappropriate to identify members of the class of deportable persons based solely on the fact that they had participated in marches or demonstrations against the Shah. Moreover, the opinion stated that the INA and the Constitution jointly require that all persons be given both a hearing and an opportunity for judicial review before being deported, therefore rendering it unlikely that the Iranians could be deported soon enough to have any practical impact on the situation in Iran. Since there were some 50,000 nonimmigrant Iranian students in the country at the time, the opinion suggested that the Attorney General could, under § 214 of the INA, 8 U.S.C. § 1184(a) (1976), promulgate a regulation requiring all Iranian nonimmigrant students to appear at INS offices and demonstrate that they had maintained their nonimmigrant student status. In light of the serious national security and foreign policy interests at stake, the opinion concluded, neither the INA nor the Due Process or Equal Protection components of the Fifth Amendment precluded either the Attorney General or Congress from taking action directed solely against these Iranian nationals.

Two days after the receipt of this opinion, the Attorney General promulgated regulations under § 214 requiring, *inter alia,* that all nonimmigrant alien post-secondary school students who were natives or citizens of Iran report to a local INS office or campus representative to provide information regarding their residence and maintenance of nonimmigrant status. *See* 8 C.F.R. § 214.5 (1979). With his or her report, each student was required to present a passport and evidence of his or her student status. Although the United States District Court for the District of Columbia initially declared that regulation unconstitutional as a violation of the students' rights to the equal protection of the laws, *see Narenji* v. *Civiletti,* 481 F. Supp. 1132 (D.D.C. 1979), on appeal, the United States Court of Appeals for the District of Columbia Circuit reversed and upheld those regulations as within the Attorney General's statutory and constitutional authority. *See* 617 F.2d 745 (D.C. Cir. 1979), *cert. denied,* 446 U.S. 957 (1980).

At the same time as the Office of Legal Counsel was considering the questions whether and under what conditions the President could lawfully require Iranian students and diplomats to leave the country, the Office was considering whether the President had the legal authority to compel the ailing Shah to return to Iran. An opinion for the Attorney General entitled "The President's Authority to Force the Shah to Return to Iran" (November 23, 1979) answered that question in the negative. The opinion concluded that the President was not authorized to extradite the Shah to Iran because no treaty or statute specifically authorized him to do so. Turning to the INA, the opinion found that the same sections of that Act discussed in the November 11 opinion, 8 U.S.C. §§ 1182(a)(27), 1253(a) & 1257(a)(7) (1976 & Supp. III 1979), empowered the Attorney General to deport the Shah if his continuing presence in this country were determined to be prejudicial to the public interest, harmful to our foreign affairs, or dangerous to the welfare, safety, or security of the United States. Under § 243(h) of the INA, 8 U.S.C. § 1253(h) (Supp. III 1979), however, as well as Articles 1.2 and 33.1 of the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, which the United States had ratified in 1968, the opinion concluded that the Attorney General lacked discretion to deport or return any refugee to a country where he or she had a "well-founded fear" of being persecuted for reasons of his or her political opinion. Since the Shah would almost certainly be punished for his political opinions if returned to Iran, the opinion reasoned that the Attorney General lacked the authority to require the Shah's return.[12]

On December 12, 1979, the United States informed the Iranian Chargé D'Affaires in Washington that the number of personnel assigned to the Iranian embassy and consular posts in the United States would henceforth be limited to a maximum of fifteen at the embassy and five at each consular post. The United States requested that Iran comply with such restrictions within five days, a request which Iran proceeded to ignore. The Office of Legal Counsel then provided the Attorney General with oral advice regarding the President's authority to act against the Iranian diplomatic personnel remaining in this country. On January 8, 1980, an opinion entitled "Presidential Power Concerning Diplomatic Agents and Staff of the Iranian Mission" formalized and expanded upon that advice. That opinion advised the Attorney General that constitutional and statutory authority existed for the President to control the presence and movement in this country of Iranian diplomatic and staff personnel by restricting their movement within the United States, including confining them to embassy grounds; preventing such persons from departing the country; and possibly subjecting them to prosecution for violations of the criminal provisions of the IEEPA. The opinion, however, cautioned that each option would raise serious questions under international law.

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[12] For a more recent discussion of the standards for withholding deportation, *see INS* v. *Stevic,* —— U.S. ——, 104 S. Ct. 2489 (1984), where the Supreme Court subsequently addressed the question whether a deportable alien must demonstrate a "clear probability" or a "well-founded fear of persecution" in the country to which he would be deported in order to obtain relief from deportation under 8 U.S.C. § 1253(h), as amended by § 203(e) of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 107. The Court concluded that § 1253(h) did not incorporate the "well-founded fear" standard found in the United Nations Protocol on the Status of Refugees, at least with respect to an alien's request to withhold deportation. The *Stevic* Court carefully avoided, however, deciding whether the "well-founded fear" standard might nevertheless apply to an alien's request for discretionary asylum under the INA.

In particular, the January 8 opinion observed that the Vienna Convention on Diplomatic Relations, *supra,* (to which both the United States and Iran are parties); customary international law; the Diplomatic Relations Act, 22 U.S.C. §§ 254a–256 (Supp. III 1979); and the Foreign Relations Authorization Act of 1979, Pub. L. No. 95–426, 22 U.S.C. § 2691 note (Supp. III 1979), all immunized Iranian diplomats from being prosecuted criminally, even if done in reprisal for Iran's actions and accompanied by all applicable constitutional protections. The opinion therefore recommended against any formal assertion by the United States that Iranian diplomatic personnel are subject to United States criminal jurisdiction under IEEPA. The opinion also expressed serious doubt as to whether Iranian diplomats could be placed in circumstances tantamount to house arrest or be prevented from leaving the United States, even in reprisal for Iran's flagrant breaches of the diplomatic immunity of United States citizens. The traditional remedy against diplomats in such circumstances, the opinion pointed out, was not to arrest or detain them, but to declare them *persona non grata* and then to expel them from the country.

An opinion for the Deputy and Associate Attorneys General entitled "Presidential Power to Expel Diplomatic Personnel from the United States," issued three months later (April 4, 1980), expanded upon these conclusions. That opinion found that the President possessed inherent constitutional power, deriving from his authority to recognize foreign countries and to receive foreign ministers, U.S. Const., Art. II, § 3, to declare nonresident alien staff members of the Iranian diplomatic mission to be *persona non grata;* to expel them forcibly from the United States within a reasonable period of time thereafter; to take all steps reasonably designed to secure all Iranian diplomatic properties; and to direct federal law enforcement officials, particularly the Secret Service, to limit the use of those properties to Iranian diplomatic personnel currently recognized and accredited by the President. This power, the opinion concluded, could be exercised consistently with customary international law generally, and with the Vienna Conventions on Diplomatic Relations and Consular Relations in particular.[13]

On April 7, 1980, three days after the OLC opinion was signed, President Carter announced that the United States was breaking diplomatic relations with the Islamic Republic of Iran. *See* 1980–81 Pub. Papers of Jimmy Carter 611–12 (1980). He proceeded to inform the government of the Islamic Republic that its embassy and consulates in the United States were to be closed immediately, to declare all Iranian diplomatic and consular officials *persona non grata,* and to require those officials to leave the country by midnight the following day. The President further instructed the Secret Service to control the movement of persons and property into and out of Iranian diplomatic facilities. *Id.* Finally, the President instructed the Secretary of State and the Attorney General to invalidate all visas issued to Iranian citizens for future entry into the United States, noting that new visas would not be issued and old visas would not be reissued, except for compelling humanitarian reasons. *See id.* at 612. In the only litigation of which OLC is aware involving the April 7 order, the President's action was sustained in an unpublished district court order denying two Iranian consular staff members' motions to obtain a temporary restraining order against their expulsion. *See Safari & Ali* v. *Carter,* Civ. No. C–80–1245–WWS (N.D. Cal. Apr. 11, 1980) (Order).

### E. International Litigation Brought by the United States

At the same time as the Executive was undertaking these various nonmilitary reprisals against Iran, the United States was also actively engaged in international litigation before the International Court of Justice (ICJ) concerning the Hostage Crisis.[14] On November 29, 1979,

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[13] The April 4 opinion further found that, prior to their expulsion, Iranian diplomatic personnel who had been declared *persona non grata* could not assert any federal statutory right to remain in this country as a means of avoiding expulsion under the INA, particularly if the Secretary of State had revoked their visas. To permit a diplomat to frustrate or delay the execution of an expulsion order by renouncing his diplomatic status and invoking the INA, the opinion reasoned, would directly impinge upon the President's constitutional power to deal with diplomats as part of his conduct of foreign relations. The opinion also concluded that the President was authorized to call upon the full range of his resources—including military, state, or local law enforcement agencies—to carry out an expulsion order in this situation. The opinion cautioned, however, that under the Due Process Clause of the Fifth Amendment, any personnel actually expelled must be afforded procedures reasonably calculated to ensure that they had in fact been previously declared *persona non grata,* and that in this limited respect, an expulsion order would potentially be subject to judicial review by writ of habeas corpus.

[14] Articles 7 and 92 of the United Nations Charter, signed in June 1945, establish the ICJ as the principal judicial organ of the United Nations. The Court, which has its seat in The Hague, the Netherlands, had as its predecessor the Permanent Court of International Justice, which was instituted by the League of Nations in 1920 and dissolved in 1946. Under the Charter, the ICJ may exercise two types of jurisdictions: "contentious" jurisdiction over adversary litigation between nations, *see* U.N.

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shortly after the hostages were seized, the United States filed an Application (i.e. complaint) against Iran before the ICJ. That Application, which OLC helped to prepare, asked the Court to adjudge and declare that Iran had violated its international legal obligations to the United States under various provisions of the Vienna Convention on Diplomatic Relations; the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261; the New York Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, opened for signature Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532; and the Treaty of Amity, Economic 9Relations, and Consular Rights Between the United States and Iran, discussed in Part A, *supra.* As relief, the United States requested that the ICJ order Iran to ensure the immediate release and safe departure of the hostages, to pay the United States reparations, and to prosecute those responsible for the seizure of the hostages and the embassy.[15]

Simultaneously, the United States filed a Request for Interim Measures of Protection (also known as a "Request for Indication of Provisional Measures") under Article 41 of the ICJ Statute, asking the Court, pending final judgment, to order the immediate release of the hostages, to facilitate their safe and prompt departure, to clear the embassy, to protect the U.S. diplomatic personnel and facilities, and to prevent the trial in Iran of any of the hostages.[16] Pursuant to 28 U.S.C. §§ 516 &

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Charter, arts. 33, 36, & 94, and "advisory" jurisdiction over nonadversary questions referred to it by the General Assembly, the Security Council, and other authorized United Nations organs and agencies. *See id.*, art. 96. Article 92 of the U.N. Charter further specifies that the ICJ "shall function in accordance with the annexed Statute [of the ICJ], which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter." All of the 157 United Nations members are *ipso facto* parties to the Statute. *Id.*, art. 93, ¶ 1.

The ICJ consists of 15 judges, I.C.J. Stat., art. 3, ¶ 1, no two of whom may be nationals of the same country, who are elected by an absolute majority of votes in both the General Assembly and the Security Council, *id.*, art. 10, and are intended to represent "the main forms of civilization and of the principal legal systems of the world." *Id.*, art. 9. Judges are elected for nine-year terms, with five judges rotating off every three years (although judges may, and frequently do, stand for reelection). *Id.*, art. 13. Before 1984, a gentlemen's agreement prevailed whereby candidates were invariably elected from four of the five permanent Security Council members—France, the USSR, the United Kingdom, and the United States—with the fifth, the People's Republic of China (PRC), choosing not to participate. [Note: A judge from the PRC was finally seated in December, 1984. Ed.] At the time of the Hostage Crisis, the Court was composed of six judges from European countries (United Kingdom, France, USSR, Poland, Italy, and Federal Republic of Germany), four from Africa and the Middle East (Egypt, Nigeria, Senegal, and Syria), two from the Far East (India and Japan), and three from the Western Hemisphere (Argentina, Brazil, and the United States). The President of the Court, Sir Humphrey Waldock, was from the United Kingdom, and the Vice-President (at this writing, the ICJ's President), Taslim Olawale Elias, was from Nigeria.

[15] The Hostage Case marked the eleventh time that the United States had appeared before the ICJ in a contentious case, and the eighth time that it had appeared as an Applicant (*i.e.*, plaintiff). The most significant contentious case in which the United States had appeared prior to the Hostage Case was the *Interhandel Case* (*Switzerland* v. *United States*) (Interim Protection). Order of October 24, 1957, [1957] I.C.J. Rep. 105.

[16] Not infrequently, an applicant state before the ICJ accompanies its application with a request for provisional measures to preserve the respective rights of either party. Such a request, like a motion for a preliminary injunction in a United States court, is a request for an order preserving the *status quo ante* pending the Court's resolution of the merits of the case. Under Article 41 of the Court's statute, the Court has the power to "indicate provisional measures of interim protection" so long as "the

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519 (1976), which authorize the Attorney General to conduct and supervise all litigation to which the United States is a party, Attorney General Benjamin R. Civiletti, with the assistance and substantial participation of both the Office of Legal Counsel and the Legal Adviser of the Department of State, appeared for the United States and argued before the ICJ in support of the United States' request for provisional measures. Iran failed to appear at the hearing, and filed only a brief letter challenging the ICJ's competence to hear the suit.

On December 15, 1979, the ICJ unanimously indicated provisional measures against Iran pending its final decision on the merits. *See Case Concerning United States Diplomatic and Consular Staff in Tehran (United States* v. *Iran)* (Interim Protection), Order of Dec. 15, 1979, [1979] I.C.J. Rep. 7. The ICJ ordered Iran immediately to restore the embassy premises to the United States' control, immediately to release all hostages, and to afford all the United States diplomatic and consular personnel the protections, privileges, and immunities to which they were entitled under the treaties in force between the two countries and general international law.[17]

Shortly thereafter, the Legal Adviser of the Department of State sought clarification of the question whether the statutory provisions defining the Attorney General's litigation responsibility, 28 U.S.C. §§ 516 & 519, encompass contentious litigation before the ICJ as well as litigation before United States domestic courts. In a formal opinion dated April 21, 1980 ("Applicability of the Litigation Responsibility of the Attorney General to Cases in the International Court of Justice"), the Attorney General advised the Legal Adviser that litigated proceedings before the International Court of Justice do lie within the supervisory power over litigation involving the United States that is committed to the Attorney General by 28 U.S.C. §§ 516 & 519.

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provisions invoked by the Applicant appear, *prima facie,* to afford a basis on which the jurisdiction of the Court might be founded." *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States* v. *Iran)* (Interim Protection), Order of Dec. 15, 1979, ¶15, [1979] I.C.J. Rep. 7.

Because interim or provisional measures are considered to be matters of utmost urgency which take precedence over any other matter on the Court's docket, I.C.J. Rules of Court, art. 74, the ICJ has not been willing to postpone issuing an order until it has definitively resolved all objections to its jurisdiction, and has usually indicated such measures within two to three weeks from the Application (and sometimes in as little time as three days). In the *Interhandel Case, see* note 15, *supra,* Switzerland sought, but the Court declined to indicate, provisional measures against the United States.

[17] Article 94, ¶ 2 of the United Nations Charter authorizes a victorious party before the ICJ to seek Security Council enforcement of "a judgment rendered by the Court." Since the Court's "indication" of provisional measures was not a final judgment, however, it was not clear whether the Security Council could enforce it. Nevertheless, on December 31, 1979, with the Soviet Union abstaining, the United Nations Security Council adopted, by a vote of 11–0, a resolution calling upon Iran to release the hostages immediately and to allow them to leave Iran. Iran, which had not appeared at the ICJ hearing on provisional measures, refused to comply with that resolution. On January 13, 1980, the United States drafted a second resolution, which would have required all United Nations members to refrain from all further exports of goods and services to Iran, with the exception of food and medical supplies. The German Democratic Republic voted against the draft resolution, however, and the Soviet Union then vetoed it. These actions apparently led the United States to refrain from seeking Security Council enforcement of the ICJ's final judgment against Iran, which was subsequently delivered against Iran in May, 1980. *See* Janis, *The Role of the International Court in the Hostages Crisis,* 13 Conn. L. Rev. 263, 277 (1981).

On May 24, 1980, after a second hearing at which Iran again failed to appear, the ICJ delivered final judgment on the merits against Iran. The Court ruled: by a vote of 13–2, that Iran had violated and was continuing to violate obligations owed by it to the United States under the international conventions in force between the two countries, as well as general international law; by a unanimous vote, that Iran must immediately take all steps to terminate the unlawful detention of the hostages, to ensure that they have the means to leave the country, to turn over the embassy, and to ensure that the hostages are not subjected to judicial proceedings; and by a vote of 12–3, that Iran was under an international legal obligation to make reparation to the United States government for its actions against the hostages. *See Case Concerning United States Diplomatic and Consular Staff in Tehran (United States* v. *Iran)* (Merits), Judgment of May 24, 1980, [1980] I.C.J. Rep. 3. Iran again ignored the Court's ruling, and the United States did not subsequently ask the United Nations Security Council to enforce that judgment. *See* note 17, *supra*.

## F. The Attempt to Rescue the Hostages by Force

Having failed to secure the early release of the hostages by nonmilitary means, in early 1980 President Carter began to consider a number of military options in Iran. An opinion for the Attorney General dated February 12, 1980, entitled "Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization," examined three of those options: (1) deployment of American troops in the Persian Gulf region; (2) a military expedition to rescue the hostages or to retaliate against Iran in the event that the hostages were harmed; and (3) an attempt to repel an external assault that threatened vital United States' interests in the region. The opinion concluded that the President had the constitutional authority to order all three of these options.

The opinion reasoned that the President's inherent constitutional authority to conduct foreign affairs recognized in *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), coupled with his enumerated power as Commander-in-Chief of the Armed Forces, U.S. Const., Art. II, § 2, cl. 1, and his duty to take care that the laws be faithfully executed, U.S. Const., Art. II, § 3, empowered him to deploy United States armed forces abroad in a situation of rescue or retaliation without a declaration of war by Congress or other advance congressional authorization. Noting the numerous instances of presidential initiative and congressional acquiescence in situations calling for immediate action, the opinion concluded that historical precedent confirmed the President's inherent power to act in an emergency without prior congressional approval. Turning to the President's statutory authority to deploy armed forces abroad, the opinion referred in passing to the Hostage Act, 22 U.S.C. § 1732, *see* note 8 *supra*, and concluded that, while the precise meaning of the Act was unclear, that provision did not amount to a congressional attempt to limit the President's constitutional powers in this situation.

The February 12 opinion then examined the effect of the War Powers Resolution (WPR), 50 U.S.C. §§1541–1548, on the President's power to use military force abroad without prior congressional authorization. The WPR provides that the "President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances" and regularly thereafter, *id.* § 1542; that the President shall send a report to Congress within 48 hours after such forces are introduced into hostilities or imminent hostilities, or sent "equipped for combat" into foreign territory, airspace, or waters, *id.* § 1543(a); that within 60 days after such a report is actually submitted or is required to be submitted, "the President shall terminate any use of United States Armed Forces with respect to which such report was submitted," unless Congress has authorized his action, *id.* § 1544(b); and that uses of armed forces covered by the WPR shall be terminated "if the Congress so directs by concurrent resolution." *Id.* § 1544(c).

With regard to threshold definitional issues, the opinion concluded that Congress did not necessarily intend the term "hostilities" in the WPR to include sporadic military or paramilitary attacks on our armed forces stationed abroad, which do not generally involve the full military engagements with which the Resolution is primarily concerned. Nor, the opinion concluded, would the WPR's consultation and reporting provisions be triggered where United States armed forces lawfully stationed abroad were fired upon and defended themselves, since such a situation would not meet the statutory precondition of "introduction" of armed forces—i.e., an active decision by the President to place forces into a hostile situation. On a third threshold issue, the opinion concluded that meaningful consultations with an appropriate group of congressional representatives would satisfy the statutory requirement that the President consult with "Congress." [18]

With respect to the constitutionality of the WPR's substantive provisions, the opinion concluded that the requirements of consultation in the WPR, while not facially unconstitutional, could raise constitutional questions depending upon how they were construed in a particular circumstance. The opinion also suggested that the 60-day limit on the use of armed forces, coupled with the provision in 50 U.S.C. § 1544(b) permitting the President to extend that deadline for up to 30 days in cases of "unavoidable military necessity," would not likely intrude unconstitutionally upon the President's responsibilities as Commander-in-Chief under the particular military scenarios under consideration there, but that the provision permitting Congress to require removal of armed forces by passage of a concurrent resolution not presented to the President was *prima facie* violative of Article I, § 7 of the Constitution. *Cf. INS* v. *Chadha,* 103 S. Ct. 2764 (1983), *discussed in* note 2, *supra.*[19]

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[18] The February 12, 1980, opinion also concluded, as a threshold matter, that the term "United States Armed Forces" in the War Powers Resolution does *not* include military personnel detailed to and under the control of the Central Intelligence Agency. That conclusion was expressly reconsidered and reversed by the Office of Legal Counsel in a subsequent opinion for the Deputy Attorney General dated October 26, 1983, entitled "War Powers Resolution: Detailing of Military Personnel to the CIA." This later opinion is published in this volume as an Appendix to the February 12, 1980 opinion at p. 197, *infra*.

On April 24–25, 1980, two months after the issuance of this opinion, the United States government attempted an unsuccessful military raid into Iranian territory aimed at rescuing the hostages. Eight American helicopters were dispatched from an aircraft carrier in the Indian Ocean to meet six cargo planes carrying commandoes for a military incursion into Tehran. Two of the helicopters developed mechanical troubles, however, and only six reached the desert site from which the rescue attempt was to be staged in operating condition. After another helicopter broke down, and before any further action was taken, President Carter ordered the mission terminated. As the aircraft departed from the desert site, a helicopter and a cargo plane collided and eight Americans were killed. *See* Taubman, *Months of Plans, Then Failure in the Desert,* N.Y. Times, Apr. 26, 1980, § A at 1, col. 2.

On April 26, the President sent a letter to the Speaker of the House and the President Pro Tempore of the Senate reporting on the failed rescue operation, consistent with the reporting provisions of the WPR.

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[19] Shortly after the Supreme Court's decision in *Chadha,* the Deputy Attorney General testified before Congress that § 5(c) of the War Powers Resolution, 50 U.S.C. § 1544(c), which would allow Congress by concurrent resolution to require the President to withdraw armed forces from hostilities, was unconstitutional. *See The Supreme Court Decision in INS* v. *Chadha and Its Implications for Congressional Oversight and Agency Rulemaking: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary,* 98th Cong., 1st Sess. 2, 37 (1983) (testimony of Edward C. Schmults, Deputy Attorney General, Department of Justice). *See also id.* at 127–31 (statement of Kenneth W. Dam, Deputy Secretary of State) (making same point). Both before and after *Chadha,* the constitutionality of the various provisions of the WPR has been the subject of extensive controversy and debate. *See generally* R. Turner, The War Powers Resolution: Its Implementation In Theory and Practice (1983) (arguing that the WPR is "unconstitutional, ineffective, and unwise"); Glennon, *The War Powers Resolution Ten Years Later: More Politics Than Law,* 78 Am. J. Int'l L. 571, 577 (1984) ("Section 5(c) of the resolution, allowing Congress by concurrent resolution to force the President to withdraw the armed forces from hostilities, is clearly invalid after *Chadha*"); Carter, *The Constitutionality of the War Powers Resolution,* 70 Va. L. Rev. 101 (1984) (arguing that the WPR remains valid after *Chadha*); Note, *A Defense of the War Powers Resolution,* 93 Yale L. J. 1330 (1984) (same); Note, *Congressional Control of Presidential War-Making Under the War Powers Act: The Status of a Legislative Veto After Chadha,* 132 U. Pa. L. Rev. 1217 (1984) (discussing the uncertain constitutionality of the WPR); Note, *The War Powers Resolution: An Act Facing "Imminent Hostilities" A Decade Later,* 16 Vand. J. Transnat'l L. 915 (1983) (same). *See also* the general historical discussion of the WPR in E. Keynes, Undeclared War: Twilight Zone of Constitutional Power (1982); and W. Reveley, III, War Powers of the President and Congress: Who Holds the Arrows and Olive Branch? (1981).

Although the February 12, 1980, opinion expressed some preliminary views regarding the unconstitutionality of the substantive provisions of the WPR other than § 5(c), OLC has not yet rendered an authoritative opinion, based upon a broad and detailed consideration of how the WPR might be applied in a wide range of situations, regarding the constitutionality *vel non* of any of these provisions. Nor, as of this writing, has the constitutionality of any of the WPR's provisions been decided by any court.

That letter was drafted based upon oral advice provided by OLC to the Counsel to the President, the Legal Adviser of the Department of State, and the General Counsel of the Department of Defense. The President informed Congress that the military operation had been ordered and conducted pursuant to his constitutional authority as Chief Executive and as Commander-in-Chief of the United States armed forces, as recognized in § 8(d)(1) of the WPR, 50 U.S.C. § 1547(d)(1). *See* 1980–81 Pub. Papers of Jimmy Carter 777–79 (1981).

Addressing the legality of the rescue attempt under international law, the President's report to Congress invoked the customary international law doctrine of "humanitarian intervention." The President observed that the United States had carried out the rescue operation "acting wholly within its right, in accordance with Article 51 of the United Nations Charter, to protect and rescue its citizens where the government of the territory in which they are located is unable or unwilling to protect them." *Id.* at 779.[20] Shortly thereafter, the United States also advised the ICJ of its view that its rescue mission had not been inconsistent with the ICJ's December 15, 1979, Order indicating provisional measures, which had directed both the United States and Iran to refrain from any acts, pending the Court's final judgment, that might aggravate the tension between the two countries or render the existing dispute more difficult of resolution. *See* pp. 84–87, *supra.*

The ICJ's final judgment, issued in May 1980, criticized the rescue attempt as action "of a kind calculated to undermine respect for the judicial process in international relations," [1980] I.C.J. Rep. at 44, ¶ 93. In ruling for the United States on the merits, however, that final judgment expressly disavowed any holding that the rescue attempt was unlawful under customary international law. *See id.* at 44–45, ¶ 94.[21]

## G. Domestic Litigation Involving the Frozen Iranian Assets—Before the Algiers Accords

While the international litigation before the ICJ was proceeding, extensive litigation had also begun in United States federal courts over the frozen Iranian assets. Suits were brought against the Islamic Republic of Iran both by U.S. commercial claimants and by the American hostages and their families.

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[20] More than three years later, the United States government invoked the same doctrine, without reference to Article 51 of the U.N. Charter, as one of three international law bases for its military action to evacuate 1,000 U.S. citizens from the Caribbean island of Grenada. *See* Statement by Kenneth W. Dam, Deputy Secretary of State, Before the House Comm. on Foreign Affairs, Nov. 2, 1983, at 8. The appropriate analysis of that action under international law has attracted considerable scholarly attention. *See, e.g.*, J.N. Moore, Law and the Grenada Mission (1984); Symposium, *The United States Action in Grenada,* 78 Am. J. Int'l L. 131 (1984) (articles by Christopher Joyner, John Norton Moore, Detlev Vagts, Francis Boyle, *et al.*); Special Report, *International Law and U.S. Action in Grenada,* 18 Int'l Law 331 (1984); Robinson, *Letter from the Legal Adviser, U.S. Department of State,* 18 Int'l Law 381 (1984); Note, *The Grenada Intervention: "Illegal" in Form, Sound as Policy,* 16 N.Y.U. J. Int'l L. & Pol. 1167 (1984).

[21] The validity of the rescue attempt under international law, and the ICJ's response to it, have been discussed at length in Stein, *Contempt, Crisis, and the Court: The World Court and the Hostage Rescue Attempt,* 76 Am. J. Int'l L. 499 (1982); Janis, *The Role of the International Court in the Hostages Crisis,* 13 Conn. L. Rev. 263, 288 (1981); and Note, *Resort to Force by States to Protect Nationals: The U.S. Rescue Mission to Iran and its Legality Under International Law,* 21 Va. J. Int'l L. 3 (1981).

1. *Suits by Commercial Claimants:* In order to implement President Carter's original freeze order of November 14, 1979, *see* pp. 73–78, *supra*, the Secretary of the Treasury, through the Office of Foreign Assets Control (OFAC), issued the Iranian Assets Control Regulations, 31 C.F.R. § 535 (1979) (IACR). Those regulations, *inter alia*, blocked the removal, transfer, or acquisition of any Iranian government assets in the United States except in accordance with the terms of OFAC licenses which either accompanied the blocking order or were later issued pursuant to regulations authorized by it. One of those regulations, 31 C.F.R. § 535.203(e), effectively prohibited United States courts from determining substantive legal rights to contested Iranian property by declaring "null and void" "any attachment, judgment, decree, lien, execution, garnishment, or other judicial process" that had not been licensed by the Secretary. Those regulations also made clear that any licenses or authorizations granted by OFAC could subsequently be amended, modified, or revoked at any time. *Id.* § 535.805.

On November 23, 1979, the Secretary of the Treasury issued a general license authorizing private litigants to institute certain judicial proceedings—such as proceedings to secure prejudgment attachments—against Iranian assets. At the same time, however, the regulations prohibited the "entry of any judgment or of any decree or order of similar or analogous effect" against such assets. *Id.* § 535.504(b), 44 Fed. Reg. 67,617 (1979). Within weeks after the Treasury Department had authorized the filing of such prejudgment attachments against blocked Iranian assets, United States banks, contractors, and other private investors who were owed amounts under contracts or loans with the Iranian government or its owned or controlled entities filed suit against Iran in federal district courts around the country.[22]

At this time, the United States government contemplated the possibility of responding to that litigation by simply "vesting," or taking title to, the frozen Iranian assets. In an opinion prepared for the Attorney General with the assistance of the Civil Division, dated March 12, 1980 ("Vesting of Iranian Assets"), the Office of Legal Counsel addressed a number of issues raised by that possibility. Since IEEPA does not authorize the President to vest foreign property, and the Trading With the Enemy Act, 50 U.S.C. App. § 5(b) (1976 & Supp. III 1979), authorizes vesting only in the event of a declared war, the opinion concluded that the Iranian property could not be vested without either a formal declaration of war against Iran or new vesting legislation. Since only Iranian government property—as opposed to private property—would be vested, the opinion reasoned, vesting would not constitute a "taking of private property for a public use without just compensation" for purposes of the Fifth Amendment. Under international law, the opinion suggested, vesting could be viewed either as a self-help remedy for the damages the United States had incurred as a result of the seizure of its diplomats, or as a reprisal for Iran's continuing violations of international law that was reasonably proportional to the injury the United States had suffered. Finally, the opinion concluded that vesting legislation would have little effect on pending domestic litigation involving Iranian assets, even with respect to prejudgment attachments, since the United States would not nullify any valid attachments upon vesting Iran's property, but would merely step into the shoes of Iran, the pre-vesting owner. The opinion cautioned, however, that under international law vesting legislation would probably not be enforceable against Iranian property located abroad.

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[22] The IACR permitted overseas branches or subsidiaries of domestic banks to engage in so-called "self-attachments," i.e., to set off any claims they might have against Iran by debiting blocked accounts held by them on Iran's behalf. The same domestic banks were not, however, permitted to assert set-off rights against Iran's bank deposits in the United States, although the IACR did allow U.S. banks to attach those deposits "for cause."

The required "cause" arose when, as a result of the assets freeze, Iran was unable to pay interest on various loans previously extended to it by private syndicates, causing its loans to be declared in default. Other loans were then quickly declared in default as a result of cross-default clauses in financial agreements, leading to a public race to attach Iranian bank deposits. *See* Ball, *The Unseemly Squabble over Iran's Assets*, Fortune, Jan. 28, 1980, at 60.

By March 5, 1980, 159 separate actions had been filed against Iran and Iranian entities in United States courts, and ultimately, about 400 actions in all were filed. The proliferation and pendency of so many private actions against Iran raised serious questions regarding the propriety of judicial resolution of cases bearing so directly on an ongoing foreign policy crisis. As commentators later noted,

> [t]his rush of plaintiffs, storming through the attachment gap in the assets regulations, threatened to undermine the United States strategy for dealing with the hostage crisis. . . . If the [Treasury regulations'] prohibition [of final judgments] were overturned, and the assets distributed, the United States would lose its primary bargaining chip for the safe return of the hostages.

Lambert & Coston, *Friendly Foes in the Iranian Assets Litigation,* 7 Yale J. World Pub. Order 88, 92 (1980).

In June 1980, the Attorney General sought advice from the Office of Legal Counsel on two questions regarding this domestic litigation: first, whether IEEPA empowered the President to order the federal courts to stay the pending litigation between United States nationals and the Islamic Republic of Iran, and second, whether, short of taking direct action with respect to the courts, the President could direct the litigants themselves to take no further action with respect to those cases.

Both questions were answered affirmatively in an opinion to the Attorney General entitled "Presidential Power to Regulate Domestic

Litigation Involving Iranian Assets," dated June 25, 1980. That opinion began by observing that the IACR already generally prohibited unauthorized transfers of Iranian government property, including Iranian property subject to legal proceedings. Since IEEPA expressly authorized the President to regulate or prohibit the exercise of rights or privileges "with respect to" foreign property, the opinion reasoned, the statute could also be read to permit the President to regulate or prohibit rights, powers, or privileges in foreign property exercised through the prosecution or adjudication of claims respecting such property brought in federal court. The President's power under IEEPA to prevent the prosecution or adjudication of such claims extended to any claim asserting an interest in property in which Iran had an interest.[23] Thus, the opinion concluded, the IACR were lawful to the extent that they already prohibited litigation involving Iranian property. Moreover, those regulations could lawfully be amended further to restrict the jurisdiction of the federal courts to adjudicate claims respecting Iranian property during the life of the blocking order, or to prohibit claimants from proceeding further with the prosecution of their existing claims.

In the summer of 1980, the United States government proceeded to file Suggestions of Interest in hundreds of pending cases, requesting that all further proceedings involving Iranian entities be stayed. *See, e.g.*, Br. for the United States as *Amicus Curiae* in *American Int'l Group* v. *Islamic Republic of Iran,* 657 F.2d 430 (D.C. Cir. 1981) (urging the court to exercise its inherent power to stay proceedings on appeal indefinitely, with an opportunity for reconsideration in 90 days). These requests were accompanied by affidavits from State and Treasury Department officials, warning that court judgments could send unintended signals to Iran regarding the policy of the United States government, or jeopardize ongoing negotiations for the release of the hostages. A number of those requests were granted, but a significant number were denied. *Compare In re Related Iranian Cases,* No. C-79-3542-RFP (N.D. Cal. Nov. 13, 1980) (granting stays in 20 cases after viewing classified affidavits of Secretary of State Edmund Muskie and Deputy Secretary of State Warren Christopher), *with New England Merchants*

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[23] In practical terms, the opinion concluded, an assertion of a claim against Iran would be tantamount to a claim "with respect to" Iranian property for purposes of IEEPA whenever the underlying obligation was secured by Iranian property under contract or by law, or whenever the viability of the claim depended upon the assertion of an interest in Iranian property (as in the case of a prejudgment attachment). The opinion also found that IEEPA could be read broadly enough to permit regulation of claims of debt asserted without reference to extraneous property interests, but found it unclear whether the statute could be stretched to cover adjudication of naked tort claims against Iran that did not otherwise involve the assertion of an "interest in property."

The courts never definitively resolved the question whether IEEPA provided a basis upon which they could stay litigation. In those cases where the courts found that IEEPA gave the Executive power to suspend the litigation altogether, a stay proved unnecessary, *see, e.g., New England Merchants Nat'l Bank* v. *Iran Power Generation & Transmission Co.,* 502 F. Supp. 120, 133-34 (S.D.N.Y. 1980); in those cases where the courts found that suspension of litigation seeking an inchoate judgment did not affect an Iranian "interest in property," they concluded that IEEPA gave the Executive no power to suspend the litigation. *See, e.g., National Airmotive Corp.* v. *Iran,* 499 F. Supp. 401 (D.D.C. 1980).

*Nat'l Bank* v. *Iran Power Generation & Transmission Co.*, 502 F. Supp. 120, 133–34 (S.D.N.Y. 1980) (denying stays in 96 consolidated cases).

Despite repeated requests for stays, and numerous unsuccessful motions by both the United States government and certain Iranian defendants to transfer all the cases for consolidation before a multi-district panel, *see, e.g.*, *In re Litigation Involving the State of Iran*, No. 425 (J.P.M.D.L. May 7, 1980); *In re Litigation Involving the State of Iran* (No. II), No. 435 (J.P.M.D.L. July 8, 1980), the litigation inched forward in at least 18 federal judicial districts across the country. In the suits that proceeded, a difficult question arose as to whether the Iranian defendants could properly be subjected to the jurisdiction of the federal courts in light of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1332, 1391, 1441, 1602–11 (1976) (FSIA). Generally speaking, the FSIA declares that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States," 28 U.S.C. § 1604, but also authorizes plaintiffs to bring civil actions against foreign sovereigns and their agencies and instrumentalities in certain carefully defined classes of cases in which Congress has determined that those defendants should not be immune. In even more carefully restricted circumstances, the FSIA permits plaintiffs to obtain prejudgment attachments to secure satisfaction of judgments that may be entered in the future against foreign government assets, but only if the defendant has explicitly waived the immunity of those assets from prejudgment attachment. *See id.* § 1610(d).

In the Iranian assets litigation, the plaintiff banks, contractors, and investors sought prejudgment attachments against frozen Iranian assets which they themselves held, *see* note 22, *supra*, against Iranian deposits held in other banks, and against Iranian property held by other commercial entities. Generally speaking, they argued that Iran had waived its immunity from such attachments under Art. XI(4) of the 1955 U.S.-Iran Treaty of Amity. A number of courts concluded, however, that plaintiffs could not so rely on Art. XI(4), since that provision did not *explicitly* waive Iran's immunity with respect to prejudgment attachments. *See, e.g.*, *Reading & Bates Corp.* v. *Nat'l Iranian Oil Co.*, 478 F. Supp. 724 (S.D.N.Y. 1979); *New England Merchants Nat'l Bank* v. *Iran Power Generation & Transmission Co.*, 502 F. Supp. 120 (S.D.N.Y. 1980).

In July 1980, the Office of Legal Counsel was asked to address the question whether IEEPA would authorize the President to suspend the FSIA in the assets litigation pending against Iran, thereby effectively barring Iran from asserting any sovereign immunity defense either against prejudgment attachment or on the merits. In an opinion for the Attorney General entitled "Presidential Authority to Suspend the Foreign Sovereign Immunities Act in Domestic Litigation Involving Iranian Assets" (July 22, 1980) OLC found it "highly doubtful" that IEEPA could be utilized to override the highly specific provisions of a comprehensive federal statute such as the FSIA. The opinion further questioned the wisdom of attempting to invoke IEEPA in this manner, particularly in the Iranian assets litigation, where it could not be forcefully argued that the President's action was significantly and demonstrably necessary to address the underlying emergency. While conceding that such a use of IEEPA might be justifiable if that use appeared essential to resolving the Hostage Crisis, the opinion found it difficult to demonstrate the necessity for invoking IEEPA where the assets were already frozen and the Administration had discretion to seek legislation to seize those assets.[24]

In September 1980, the United States and Iranian governments began steps to initiate serious negotiations regarding settlement of the Hostage Crisis. From this time until the conclusion of the Algiers Accords, the Office of Legal Counsel represented the Attorney General on the small, Washington-based working group on the United States negotiating position headed by Deputy Secretary of State Warren Christopher. On September 10, through the intermediation of the West German government, Deputy Secretary Christopher and the Legal Adviser to the State Department met with an Iranian official in Bonn, Germany. At that meeting the two sides discussed four conditions which the Ayatollah Khomeini viewed as prerequisite to any release of the hostages: (1) return of the Shah's wealth to Iran; (2) cancellation of private and public claims against Iran; (3) unfreezing of the Iranian assets; and (4) a commitment from the United States not to interfere in Iran's internal affairs. These negotiating demands raised numerous historically unresolved questions regarding the scope of the President's constitutional and statutory authority to enter international agreements with foreign governments that settle private claims of American citizens against those governments.

Addressing those issues in an opinion for the Attorney General dated September 16, 1980, entitled "Presidential Authority to Settle the Iranian Crisis," OLC concluded that the President possessed the constitutional and statutory authority to enter an executive agreement with Iran that settled American citizens' claims against Iran and returned to Iran some of its blocked funds; that the President was empowered to implement such an agreement under IEEPA by revoking existing licenses permitting prejudgment attachments against blocked Iranian funds in federal and private banks, then licensing Iran to withdraw those funds, even over the objection of disappointed lien claimants; that an order under IEEPA would be effective "extraterritorially" to license Iran to withdraw its funds even from foreign branches of American banks, so long as previously licensed set-offs in those branches were left undisturbed; that the settlement agreement could lawfully provide for the United States to aid Iran in recovering the Shah's assets in *Islamic Republic of Iran* v. *Pahlavi* (the New York state court litigation discussed in Part C *supra*); and, that so long as the United States government did not vest itself of the Shah's assets, but simply undertook to aid Iran in its domestic litigation, a successful takings challenge by the Shah's estate would be unlikely. *Cf.* March 12, 1980 OLC opinion, *discussed at* pp. 91–92, *supra.*[25]

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[24] Notwithstanding this conclusion, at least one district court later ruled that the President's action in issuing the IACR had temporarily suspended Iran's sovereign immunity from prejudgment attachment, without conferring any lasting rights with respect to the assets, a position that the United States government had neither urged nor endorsed. *See New England Merchants Nat'l Bank* v. *Iran Power Generation & Transmission Co.*, 502 F. Supp. 120, 129 (S.D.N.Y. 1980). That opinion was later modified by *Marschalk Co., Inc.* v. *Iran Nat'l Airlines Corp.*, 518 F. Supp. 69 (S.D.N.Y. 1981), which was in turn dismissed in part on other grounds by the Supreme Court. *See* 453 U.S. 919 (1981). Moreover, in *E-Systems, Inc.* v. *Islamic Republic of Iran*, 491 F. Supp. 1294 (N.D. Tex. 1980), another district court adopted reasoning similar to that expressed in the OLC opinion discussed in text, concluding that the IACR, issued under IEEPA, had not *de facto* displaced the FSIA's grant to Iran of sovereign immunity from prejudgment attachments.

On the same day, the Office of Legal Counsel sent the Attorney General a second opinion examining more fully the option of the United States government's vesting the Iranian dollar deposits held in the foreign branches of American banks. That opinion, also dated September 16, 1980, and entitled "Congressional Power to Provide for the Vesting of Iranian Deposits in the Foreign Branches of United States Banks," explored in greater detail some of the issues analyzed in the March 12, 1980, OLC opinion discussed above. The September 16 opinion concluded that Congress had the power under Article I, § 8 of the Constitution to authorize the peacetime vesting of the assets of a foreign government in the control of foreign branches of American-owned and incorporated-banks, notwithstanding the extraterritorial location of those assets. While conceding that an uncompensated seizure of extraterritorial assets might violate particular treaties or general principles of international law, the opinion concluded that an express congressional directive that vesting should take place would likely be enforced in United States courts.[26] The opinion cautioned, however,

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[25] In passing, the opinion also reached a number of significant subsidiary conclusions: that Congress did not intend the FSIA to limit the President's established power to settle claims; that claimants whose claims are settled for less than their stated value should not be able to receive additional compensation from the government on the theory that the settlement constituted a taking; that because the government reserved full rights in the IACR to revoke licensed attachments at will, those licenses could be revoked without giving rise to a successful takings claim; that as an incident to an executive agreement finally settling the claims of American citizens, the President could void attachments and other inchoate interests relating to those claims; and, that a separate executive order blocking assets owned by the Shah's estate would be a necessary prerequisite to any effort to return the Shah's assets to Iran.

Subsequently, the Supreme Court agreed with the first, third, and fourth of these conclusions in *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981), *discussed in* Part H, *infra.* The second conclusion is currently the subject of litigation in a case unrelated to the Hostage Crisis now pending in the United States Court of Appeals for the Federal Circuit. *See Shanghai Power Co.* v. *United States, dismissed,* 4 Cl. Ct. 237 (1983), *appeal pending,* No. 84–860 (Fed. Cir. July 9, 1984). The fifth conclusion was implemented by Executive Order No. 12,284 ("Restrictions on the Transfer of Property of Former Shah of Iran"), which was issued on January 19, 1981. *See* Part H, *infra* (discussing this order).

[26] Thus, the opinion concluded that the overseas assets could be subject to the extraterritorial effect of vesting legislation because American-owned and -incorporated foreign branches of United States banks were "United States persons" subject to United States legislative jurisdiction.

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that in a suit brought by Iran overseas to recover its deposits, foreign courts might refuse to give effect to what would appear to be the United States' uncompensated extraterritorial expropriation of nonenemy assets, thus creating difficult international jurisdictional conflicts.[27] The opinion suggested that this problem might be partially alleviated if Congress were to authorize seizure of overseas deposits by permitting vesting orders to be served against the head offices of the banks involved, which were located in New York, since those head offices appeared to have actual control of the overseas deposits.

On October 8, 1980, the Office of Legal Counsel sent the Attorney General yet another opinion dealing with the disposition of the frozen Iranian assets, entitled "Presidential Authority to Permit the Withdrawal of Iranian Assets Now in the Possession of the Federal Reserve Bank." That opinion expanded upon the conclusions previously drawn in the Office's first opinion of September 16, finding that IEEPA authorized the President to nullify outstanding attachments against blocked Iranian assets simply by revoking existing licenses for attachments against those assets granted by 31 C.F.R. § 535.504(a), and then licensing withdrawal of those blocked assets by the Central Bank of Iran and the Bank Markazi Iran. Relying upon the Supreme Court's decision in *Orvis* v. *Brownell,* 345 U.S. 183 (1953), the opinion reasoned that, since the President had, in the IACR, expressly withheld his consent to the entry of final judgments against the blocked assets and reserved the right to revoke his consent to prejudgment attachments at any time, *see* 31 C.F.R. § 535.805, he could simply invoke that right and nullify those attachments without effecting any compensable taking of private property. *Cf.* note 25 *supra* (discussing first September 16 opinion).

The opinion further concluded, as a critically important procedural matter, that the Federal Reserve Bank of New York could rely on the President's actions under IEEPA to release assets which had been attached, but which were not yet subject to a licensed final judgment, without first applying to the courts to vacate their prior attachment

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[26] Although the validity under international law of the extraterritorial reach of IEEPA or any congressional vesting legislation was not resolved in the Hostage Crisis, *cf.* note 6, *supra,* similar issues were raised, but not conclusively resolved, two years later during the controversy over the application of the Export Administration Act to high-technology exports bound for the Soviet pipeline. In *Dresser Industries, Inc.* v. *Baldridge,* 549 F. Supp. 108 (D.D.C. 1982), an American corporation unsuccessfully sought to obtain a federal court injunction barring the United States from imposing sanctions upon it for its French subsidiary's failure to comply with controls issued pursuant to the EAA, that purported to reach all persons "subject to the jurisdiction of the United States." The plaintiff argued that the extraterritorial extension of United States export controls to foreign-incorporated subsidiaries of American companies would violate international law.

[27] Indeed, during the 1982 Soviet pipeline controversy, *see* note 26, *supra,* a Dutch court held that an American subsidiary incorporated and having its principal place of business in the Netherlands should be treated as a Dutch, rather than as an American, corporation. Consequently, under relevant principles of international law, United States extraterritorial export controls could not apply. *See Compagnie Europeene des Petroles* v. *Sensor Nederland B.V.,* No. 82/7216 (Dist. Ct., the Hague, 1982) *reprinted in* 22 I.L.M. 66 (1983). The Dutch ruling did not, however, address the appropriate treatment of foreign *branches* of U.S. companies, as opposed to their foreign-incorporated *subsidiaries.*

orders. So long as the Federal Reserve Bank complied in good faith with the President's order vacating the attachments and rendering them unenforceable pursuant to Congress' authorization in IEEPA, OLC asserted, the courts would abuse their discretion if they used their contempt power to penalize that compliance.[28] Finally, the opinion stated, neither the Federal Reserve Bank nor the United States could be held liable to attachment creditors for damages resulting from the loss of their prejudgment security, even if the presidential orders nullifying the attachment orders were ultimately held to be unlawful.

2. *Suits by the Hostages and Their Families:* At the same time as OLC was reviewing the general scope of the President's claims settlement authority in anticipation of an international settlement with Iran, it was also exploring the specific question whether the President had authority to extinguish any claims that the hostages and their families might wish to assert against the Islamic Republic of Iran for kidnapping, false imprisonment, and other torts arising out of acts committed by Iran and its agents in the United States embassy compound in Tehran.

In an opinion dated October 14, 1980, entitled "Presidential Authority to Settle Claims of the Hostages and their Families," OLC concluded that the President did possess such authority.[29] The opinion noted the difficulty of identifying any real loss to the hostages resulting from the extinction of their claims, since any such extinction would presumably result from an international settlement negotiated primarily for their personal benefit. Moreover, the opinion noted that the hostages would be unlikely to recover in a United States court on tort claims from Iran in any event, since the noncommercial tort provision of the FSIA, 28 U.S.C. § 1605(a)(5), permits courts to award tort damages against a foreign state only "for personal injury or death . . . *occurring in the United States*" (emphasis added). Since the hostages' own injuries occurred in Iran, not in the United States, the opinion concluded that the hostages would be barred from recovery in any event by the FSIA.

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[28] Although this issue appeared on its face to be a procedural technicality, in fact the Office of Legal Counsel resolution of this difficult question was to prove critical to the successful implementation of the Algiers Accords. Throughout the negotiations in Algeria, the Islamic Republic of Iran insisted upon contemporaneous transfer of the full amount of its funds frozen in the United States in exchange for the release of the hostages. Even the temporary refusal of a federal district court to void its attachments could have potentially frustrated the ability of the executive branch to carry out its obligation under the Algiers Accords to make the requisite contemporaneous transfer. *See* pp. 100–06, *infra.* Thus, the Office of Legal Counsel concluded that unilateral, *ex parte* actions by the Federal Reserve Bank that would clearly have been punishable by contempt if undertaken by private parties would not warrant contempt in these narrow and highly extraordinary circumstances.

[29] A later opinion, dated November 13, 1980, and entitled "Congressional Authority to Modify an Executive Agreement Settling Claims Against Iran," addressed another aspect of the same policy issue: whether Congress could constitutionally override an executive agreement that purported to settle or extinguish all The opinion found no legal impediment to such legislation, because in this area Congress had exercised authority to enact statutes that modify or abrogate preexisting executive agreements for domestic law purposes. No court ever adjudicated this issue, however, because Congress never enacted the draft legislation amending the FSIA in the manner proposed.

The conclusions stated in this opinion were ultimately upheld by two circuit courts in *Persinger* v. *Islamic Republic of Iran,* 729 F.2d 835 (D.C. Cir. 1984), *cert. denied,* — U.S. —, 105 S. Ct. 247 (1984), and *McKeel* v. *Islamic Republic of Iran,* 722 F.2d 582 (9th Cir. 1983), *cert. denied,* — U.S. —, 105 S. Ct. 243 (1984). In both cases, former hostages and their families sought tortious damages from Iran for injuries inflicted upon the hostages by their seizure and detention in the United States embassy compound in Tehran. Pursuant to its obligations under the Algiers Accords, *see* Part H, *infra,* the United States intervened as a party defendant on behalf of Iran. The United States then argued that Iran was immune from plaintiffs' suit, since their injury had not occurred "in the United States" within the meaning of § 1605(a)(5) of the FSIA. Plaintiffs countered that the FSIA had defined the term "United States" in 28 U.S.C. § 1603 to include "all territory and waters, continental or insular, *subject to the jurisdiction of the United States*" (emphasis added). Because, under international law, the United States embassy compound in Tehran was arguably subject to the *concurrent* jurisdiction of the United States, the plaintiffs asserted that the FSIA did not apply to bar their suit.

Although a panel of the United States Court of Appeals for the District of Columbia Circuit initially accepted plaintiffs' assertion, on rehearing the panel reversed itself and accepted the Government's position. *See Persinger* v. *Islamic Republic of Iran,* 690 F.2d 1010 (D.C. Cir. 1982), *vacated and holding regarding FSIA reversed,* 729 F.2d 835 (D.C. Cir. 1984). In *McKeel, supra,* the Ninth Circuit considered the same issue and similarly concluded that the noncommercial tort provision of the FSIA barred plaintiffs' suit from going forward. *See* 722 F.2d at 589. A number of other federal court suits against Iran by former hostages or their families were also dismissed. *See Williams* v. *Iran,* 692 F.2d 151 (D.C. Cir. 1982); *Lauterbach* v. *Iran,* 692 F.2d 150 (D.C. Cir. 1982); *Moeller* v. *Islamic Republic of Iran,* No. 80-1171 (D.D.C. August 5, 1981) (no appeal taken). On October 9, 1984, petitions for certiorari were denied in both *Persinger* and *McKeel.* 105 S. Ct. 243, 247.

These lawsuits did not definitively resolve the question of what financial compensation, if any, should be paid to the former hostages and their families. On January 19, 1981, as one of ten executive orders implementing the Algiers Accords, *see* Part H, *infra,* President Carter established a nine-member Presidential Commission on Hostage Compensation to determine what compensation was due the hostages and their families. *See* Exec. Order No. 12,285, 46 Fed. Reg. 7931 (1981), *reprinted in* 50 U.S.C. § 1701 note (Supp. V 1981). In September 1981, the Commission issued a final report recommending that Congress amend the Hostage Relief Act of 1980, Pub. L. No. 96-449, 94 Stat. 1967, to compensate those governmental employees who had been held hostage in Tehran for their medical costs and property damage. The Commission further concluded, however, that the United States was *not* obligated to compensate the hostages for the loss of their right to sue Iran or for any actual harm suffered by the hostages during their detention. Instead, the Commission recommended that the government pay each government employee held hostage the sum of $12.50 per day of captivity.[30]

In response, two groups of former hostages and their families filed suit against the United States in the Claims Court seeking compensation for the taking of their claims against Iran. *See Cooke* v. *United States,* 1 Cl. Ct. 695 (1983); *Amburn-Lijek* v. *United States,* No. 564-82C (Ct. Cl. Nov. 4, 1982). Because the *Persinger* and *McKeel* decisions have held Iran immune from such claims, it remains an open question whether the hostages were in fact deprived of anything of value. As of this writing, both suits are still pending before the Claims Court.

### H. The Signing and Implementation of the Algiers Accords

1. *The Negotiations:* During the fall of 1980, settlement negotiations intensified. The Shah's death in Cairo, Egypt, in July 1980 eliminated one central point of controversy between the United States and Iran—whether the United States should assist the Islamic Republic in obtaining the Shah's return to Iran. *Cf.* pp. 81–84, *supra* (discussing the November 23, 1979, OLC opinion concluding that the President lacked the authority to force the Shah to return to Iran). On September 22, 1980, war was formally declared between Iran and Iraq, an event which apparently spurred the Islamic Republic to seek a prompt settlement of the dispute. On November 2, the Iranian Parliament formally promulgated the Ayatollah's four conditions of September 10, 1980 for the release of the American hostages. *See* p. 95, *supra.* On November 10, six days after Ronald Reagan was elected President, representatives of the United States and Iran began intensive negotiations over these four conditions. At no time during these negotiations, however, either in Algeria or in the United States, did United States and Iranian officials actually meet face-to-face; instead, negotiations were conducted exclusively through Algerian government officials, who had agreed to serve as intermediaries or "interlocutors." The negotiations took place in three cities. The United States would propose terms to the Algerians in Algiers, who would then fly to Tehran and present them to the Iranians. The Algerians would then fly to Washington to present the Iranian responses to the United States government.

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[30] The Commission arrived at the $12.50 per day figure by following the precedent established in the War Claims Act of 1948, 50 U.S.C. App. §§ 2001–2005 (1976). That Act provided similar *per diem* sums to prisoners of war and civilians interned during World War II, the Korean War, the taking of the *Pueblo* by North Korea, and the Vietnam War. The Commission recommended no compensation for the one private citizen held hostage in Iran who was not a government employee. *See* President's Commission on Hostage Compensation, Final Report and Recommendations 84 (1981).

With respect to one of the four Iranian conditions—the demand that the United States recognize the nationalization of the Shah's assets as a prerequisite to resuming normal relations—the question arose whether the United States could lawfully give effect within its borders to the Iranian decrees confiscating the property of the late Shah and his close relatives. An opinion addressed to the Legal Adviser of the Department of State, dated November 17, 1980 and entitled "Effect Within the United States of Iranian Decrees Confiscating the Shah's Assets," discussed this issue.

The opinion reasoned that the judicially created act of state doctrine, as articulated in its modern form in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 416 (1964), generally requires United States courts to recognize and enforce foreign nationalization decrees against property located *within* the territory of the nationalizing state. Under the rule stated in *Republic of Iraq* v. *First Nat'l City Bank,* 353 F.2d 47 (2d Cir. 1965), *cert. denied,* 382 U.S. 1027 (1966), however, United States courts are not generally required to recognize or enforce such decrees against property located outside the nationalizing state, particularly when that property is also located in the United States. Although the opinion found that the courts would not treat a presidential proclamation dealing with the Shah's property as conclusive, it held that the Supreme Court's decisions in *United States* v. *Belmont,* 301 U.S. 324 (1937), and *United States* v. *Pink,* 315 U.S. 203 (1942), would be controlling if the President were to enter into an executive agreement recognizing the validity of an Iranian expropriation decree. *Belmont* and *Pink* concerned an executive agreement between the United States and the Soviet Union that recognized the validity of Soviet expropriation decrees and assigned the United States all of the Soviet Union's claims against United States nationals. The Supreme Court held that the Soviet nationalization decrees could be enforced extraterritorially against property located in the United States. Accordingly, the November 17, 1980, opinion concluded that the Executive could, as an integral part of an international agreement with Iran settling the Hostage Crisis, stipulate that Iranian nationalization decrees would have an extraterritorial effect that United States courts would recognize.

On December 2, 1980, Deputy Secretary of State Christopher arrived in Algeria to present a detailed United States response to the four Iranian conditions. On December 19, the Islamic Republic unexpectedly demanded that the United States pay Iran $24 billion in exchange for a settlement. The Carter Administration publicly rejected this demand, but private negotiations continued in earnest. *See* Norton & Collins, *Reflections on the Iranian Hostage Settlement,* 67 A.B.A. J. 428, 429 (1981). Shortly after New Year's Day 1981, Algeria reported Iran's willingness to enter a final settlement if the United States would immediately turn over $9.5 billion in frozen assets. Deputy Secretary Christopher returned to Algeria, and on January 15 reached a compromise whereby Iran agreed to release the hostages in exchange for the immediate return of $7.955 billion in frozen assets.

At this point, the OLC opinion of October 8, 1980, discussed at pp. 97–98 & n. 28, *supra,* became particularly critical to the negotiations, because the immediate transfer of the approximately $2.5 billion in Iranian funds held by the Federal Reserve Bank in New York was essential to make up the $7.955 billion demanded by Iran. In addition, it became necessary for the United States government to convince the Islamic Republic that $9.5 billion, the larger sum that Iran had demanded, could *not* be transferred immediately because the frozen Iranian assets held in domestic banks other than the Federal Reserve Bank in New York were subject to prejudgment attachments and could not be transferred without further involvement by numerous federal district courts. The United States negotiators conveyed to Iran the message that the holders of those funds could be expected to seek immediate judicial review of any presidential order seeking to effect such a transfer before they would comply with any such order and that therefore those funds could not be immediately transferred.

Anticipating a settlement and based upon their continuing negotiations with executive officials, United States bankers engaged in intense private negotiations with their European counterparts to finalize the complex financial transactions that would govern the release of the assets.[31] In brief, those negotiations, ultimately approved by the two governments, concluded that the overseas branches of 16 American commercial banks would transfer by telex some $5.5 billion in Iranian funds held in their foreign branches to the Federal Reserve Bank of New York, which would credit that money to the Bank of England, a mutually agreeable central bank, as depositary, which would in turn credit the account of the Central Bank of Algeria as escrow agent. Once the Bank of England had notified the governments of Algeria, Iran, and the United States that it had received gold, dollars, and securities in the aggregate amount of $7.955 billion, the Iranians were required to bring about the safe departure of the 52 hostages.

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[31] Even as the likelihood of a settlement increased, the United States government remained concerned that Iran might suddenly end or reduce exports of its oil to some United States allies who were heavily dependent on Iranian oil. In an opinion for the Associate Attorney General dated January 12, 1981 and entitled "Diverting Oil Imports to Allies," OLC concluded that IEEPA empowered the President, in dealing with the declared national emergency, to respond to an Iranian cutoff of oil to United States allies. Under IEEPA, the President could require American oil companies and the foreign entities they control to ship oil they acquire abroad to nations specified by the President and in certain specified quantities, so long as that oil is "property in which any foreign country or a national thereof has any interest." *See* 50 U.S.C. § 1702(a)(1)(B) (Supp. III 1979). The opinion also found that § 232(b) of the Trade Expansion Act of 1962, 19 U.S.C. § 1862(b), upon which the President had originally relied to discontinue oil purchases from Iran, *see* Part B *supra,* authorized the President in certain circumstances threatening the national security to respond to an Iranian oil cutoff by imposing a quota on oil imports into the United States. The opinion did not view that provision of the Trade Expansion Act, however, as empowering the President to direct the diversion of oil imports to other countries.

As soon as the hostages cleared Iranian airspace, the escrow agent, the Central Bank of Algeria, was to instruct the Bank of England to release $3.667 billion back to the Federal Reserve Bank of New York, which would in turn use those funds to pay off in full all syndicated Iranian loans in which a United States bank was a participant. The Bank of England would also retain an additional $1.418 billion in escrow to pay off any unpaid principal of and any interest owing on the syndicated loans and credits and indebtedness of Iran and its instrumentalities held in United States banking institutions, as well as disputed amounts of deposits, assets, and interest, if any, owing on Iranian deposits in United States banks. *See* 20 I.L.M. 229 (1981).

2. *The Settlement:* On January 18, 1981, two days before President-elect Reagan was to be inaugurated, Iran accepted the basic terms of the settlement outlined above. On January 19, 1981, at 3:00 a.m., Washington time, Deputy Secretary Christopher initialed the four documents that formed the Algiers Accords, which have become known as the Assets Agreement, the Claims Settlement Agreement, the Escrow Agreement, and the Depositary Agreement.[32] Because the Iranians refused to sign a bilateral agreement with the United States, the first two agreements, which formed the heart of the settlement, were set out in Declarations by the Democratic and Popular Republic of Algeria. Those declarations stated the terms of the agreements and proclaimed that both Iran and the United States had formally adhered to them.

In brief, the Assets Agreement provided that Iran would release the 52 American hostages in exchange for a United States pledge of nonintervention in Iranian internal affairs and the delivery to an escrow account of all frozen Iranian assets in the United States and abroad subject to the jurisdiction of the United States. *See* Declaration of the Government of the Democratic and Popular Republic of Algeria, January 19, 1981, ¶¶ 1, 4–9, *reprinted in* 20 I.L.M. 224 (1981). The Assets Agreement went on to rescind virtually all of the economic and political sanctions taken by the United States against Iran over the preceding 14 months. The Agreement provided that the United States would (1) "revoke all trade sanctions which were directed against Iran in the period Nov. 4, 1979, to date," *id.*, ¶ 10, *cf.* Part B, *supra*; (2) "freeze, and prohibit any transfer of, property and assets in the United States" of the former Shah and any of his close relatives "served as a defendant in United States litigation brought by Iran to recover such property and assets as belonging to Iran," *id.*, ¶ 12, *cf.* Part C, *supra*; [33] (3) "promptly withdraw all claims now pending against Iran before the International Court of Justice," *id.*, ¶ 11, *cf.* Part E, *supra*; (4) "not . . . intervene . . . militarily, in Iran's internal affairs," *id.*, ¶ 1, *cf.* Part F, *supra*; (5) "terminate all [ongoing and future] legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises" and "nullify all attachments and judgments" against Iranian assets, *id.*, ¶ B, *cf.* Part G(1), *supra*; and (6) "bar and preclude the prosecution against Iran of any pending or future claim of . . . [any] United States national arising out of events" related to the seizure and detention of the 52 American hostages, *id.*, ¶ 11, *cf.* Part G(2), *supra*.

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[32] The Escrow Agreement and the Depositary Agreement specified the obligations and powers of the Central Bank of Algeria as escrow agent and the Bank of England in London as the depositary. The United States and Iran also executed a set of "Undertakings" with respect to the principal agreements. An intricate technical attachment to the Escrow Agreement, known as the "Implementing Technical Clarifications and Directions," was also executed by representatives of the Algerian Central Bank as escrow agent, the Bank of England, and the Federal Reserve Bank of New York as the United States' fiscal agent. Most of these agreements are reprinted in 20 I.L.M. 223 (1981).

The accompanying Claims Settlement Agreement addressed the outstanding claims of United States nationals against Iran by establishing a new international arbitral tribunal at the Hague. In the past, the United States had generally settled similar claims not by creating a new arbitral entity, but rather, by relying upon existing international arbitral bodies or by obtaining a lump-sum payment from the foreign government that purported fully and finally to satisfy all outstanding claims of U.S. nationals against that government. *See generally* 1 R. Lillich & B. Weston, International Claims: Their Settlement by Lump Sum Agreements (1975). Thus, the Claims Settlement Agreement marked a dramatic shift from 20th century United States practice with regard to settlement of international claims. The Agreement established a nine-member Iran-United States Claims Tribunal (Tribunal) which, beginning six months from the effective date of the Agreement, would have exclusive jurisdiction to decide outstanding claims by nationals of either country against the government of the other arising out of debts, contracts, expropriations, or other measures affecting property rights, as well as official intergovernmental claims arising out of certain sales contracts between the United States and Iran, and disputes as to the interpretation or performance of any provision of the Algiers Accords themselves.

The Tribunal, whose awards were to be enforceable in the domestic courts of any nation, was further authorized to make its legal determinations pursuant to substantive principles of commercial and international law and the procedural rules for arbitration established by the United Nations Commission on International Trade Law (UNCITRAL). Awards were to be paid from a security account funded initially with $1 billion of the unfrozen Iranian assets, subject to the commitment of the government of Iran and its central bank, the Bank Markazi Iran, to replenish that account if it should fall below $500 million during the claims adjudication process. The depositary for the Security Account was a subsidiary of the Central Bank of the Netherlands, with the Algerian Central Bank acting as escrow agent.

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[33] In ¶¶ 12-14 of the Assets Agreement, the United States also agreed to retrieve and freeze assets of the Shah and his close relatives located in the United States. Significantly, as was recommended by the November 17, 1980, OLC opinion to the Legal Adviser of the Department of State, discussed at pp. 100-01, *supra*, the United States agreed that both "Iranian decrees and judgments relating to such assets should be enforced . . . in accordance with United States law," *Id.*, ¶ 14. Furthermore, ¶ 14 of the Agreement abrogated any sovereign immunity or act of state defense that might otherwise be asserted against Iranian claims to the Shah's domestic property. *Cf.* p. 79, *supra*.

3. *Implementing the Settlement:* Beginning in November 1980, in the course of providing advice with respect to the negotiations in Algeria, the Office of Legal Counsel had continuously revised a draft of a formal opinion of the Attorney General which analyzed the legal issues presented by the terms of the various proposed settlements that were offered during those negotiations. *See* 28 C.F.R. § 0.25(a) (authorizing the Assistant Attorney General, Office of Legal Counsel, to supervise the preparation of the formal opinions of the Attorney General). On January 19, 1981, the day the Algiers Accords were initialed, the Attorney General sent the President a formal opinion which was entitled "Legality of Actions Described in International Agreement with Iran and in Implementing Executive Orders." That opinion reviewed the four international agreements initialed by Deputy Secretary Christopher and the series of ten executive orders proposed to implement those agreements, *see* Exec. Order Nos. 12,276 through 12,285, 46 Fed. Reg. 7913–31 (1981), *reprinted in* 50 U.S.C. § 1701 note (Supp. V 1981), and concluded that the President and his delegates had legal authority to issue all of them.

As their captions make clear, the first six executive orders directed the Secretary of the Treasury, the Federal Reserve Bank of New York, and the Federal Reserve Board to take the steps necessary to implement the complex financial transactions outlined at pp. 102–03, *supra.*[34] Largely restating the analysis set forth in the Office of Legal Counsel opinions of September 16, 1980, *see* pp. 95–97, *supra,* the Attorney General concluded that each of these six orders fell within the President's powers under IEEPA and the Hostage Act to order the transfer of property owned by Iran as directed by Iran and to nullify outstanding attachments and court orders related to such property. For the reasons stated in the Office of Legal Counsel opinion of October 8, 1980, *see* pp. 97–98 & n. 28, *supra,* the Attorney General also advised that anyone taking action in good-faith compliance with those orders would be immune from liability.

The seventh executive order, Exec. Order No. 12,282 entitled "Revocation of Prohibition Against Transactions Involving Iran," revoked the executive orders of April 7 & 17, 1980, limiting trade with and travel to Iran, as well as the President's November 14, 1979, restriction on oil imports from Iran. *See* Part B, *supra*. The Attorney General then concluded that the eighth and tenth orders, which implemented the President's decision to extinguish the claims of former hostages and their families against Iran, *see* Exec. Order No. 12,283 ("Non-Prosecution of Claims of Hostages and for Actions at the United States Embassy and Elsewhere") and Exec. Order No. 12,285 ("President's Commision on Hostage Compensation"), were authorized by the President's power under IEEPA and the Hostage Act to take steps in aid of his constitutional authority to settle claims of the United States or its nationals against a foreign government. *Cf.* pp. 98–100, *supra*. The Attorney General further concluded that IEEPA authorized the ninth executive order, Exec. Order No. 12,284 ("Restrictions on the Transfer of Property of the Former Shah of Iran"), which implemented the paragraphs of the Assets Agreement wherein the United States had agreed to assist Iran in its litigation to obtain the former Shah's assets. *See* note 33, *supra*. Finally, the opinion advised that the President's inherent constitutional powers to conduct foreign relations, supplemented by Article XXI(2) of the Treaty of Amity, the Hostage Act, and historical precedent, all authorized the President to enter an agreement designating the Iran-United States Claims Tribunal as the sole forum for the determination of the various types of claims over which the Algiers Accords gave it jurisdiction.

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[34] *See* Exec. Order No. 12,276 ("Direction Relating to Establishment of Escrow Accounts"); Exec. Order No. 12,277 ("Direction to Transfer Iranian Government Assets"); Exec. Order No. 12,278 ("Direction to Transfer Iranian Government Assets Overseas"); Exec. Order No. 12,279 ("Direction to Transfer Iranian Government Assets Held by Domestic Banks"); Exec. Order No. 12,280 ("Direction to Transfer Iranian Government Financial Assets Held by Non-Banking Institutions"); Exec. Order No. 12,281 ("Direction to Transfer Certain Iranian Government Assets").

### I. Subsequent Ratification of the Algiers Accords

Although the Algiers Accords were formally implemented on January 19, 1981, the hostages themselves were not finally released until about 12:30 p.m., Washington time, January 20, 1981, 30 minutes after President Reagan was inaugurated. Soon after the hostages' release, a number of commentators suggested that, as a matter of international law, the Algiers Accords were void *ab initio*, either in whole or in part, because the United States had negotiated those Accords under duress. In particular, these commentators pointed to Article 52 of the Vienna Convention on the Law of Treaties, U.M. Doc. A/CONF. 39/27, May 23, 1969, *reprinted in* 8 I.L.M. 679 (1969), which states:

> A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

*See, e.g., Obligations of the United States*, Wall St. J., Jan. 27, 1981, at 30, cols. 1–2; Malawer, *A Gross Violation of Treaty Law*, Nat'l L.J., Mar. 2, 1981, at 13, col. 1.

The new Administration conducted a comprehensive review of the Algiers Accords in light of these charges. During that review, the Office of Legal Counsel was asked to prepare a legal opinion regarding the validity of the Accords under both domestic and international law. An opinion for the Attorney General dated January 29, 1981 and entitled "Review of Domestic and International Legal Implications of Implementation of the Agreement with Iran" surveyed both the domestic and international law arguments that could be raised against the Accords. With respect to the various domestic law objections, the Office of Legal Counsel reviewed the legal authorities relied upon in its earlier opinions, as well as in the formal January 19, 1981, Opinion of the Attorney General, and concluded that each of the executive actions taken were well within the power conferred on the President by the Constitution, federal statutes, and treaties.

With respect to the international law arguments, the opinion reached six separate conclusions: (1) that a persuasive case could be made that the Accords were void *ab initio* under international law; [35] (2) that the United States' act of *negotiating* the Accords under duress was not in itself a violation of international law; (3) that once Iran's coercion had been removed, the President could, consistent with international law, choose either to repudiate or to adhere to the Accords; (4) that any presidential decision to repudiate the Accords should be confirmed by litigation before the ICJ, rather than before the Iran-United States Claims Tribunal; (5) that any challenge to whatever decision the President might make regarding ratification of the Accords would raise a political question unreviewable in United States domestic courts; and (6) that if the United States should decide to repudiate the Accords, serious questions would arise concerning revival of hostage claims against Iran and the proper disposition of Iranian assets already transferred to the escrow account or still frozen in United States domestic accounts.

Following receipt of this opinion, the Attorney General requested the additional views of the Office of Legal Counsel on the related question whether, if the Accords were void under international law, the United States could choose, consistent with international law, to implement some parts of the Agreement and not others. In an opinion dated February 5, 1981, entitled "Whether the Agreement with Iran Can Be Treated as Void in Part," the Office of Legal Counsel concluded that the provisions of the agreement were not separable—*i.e.,* that if the United States chose to honor some provisions of the Accords, it would have a legal duty under international law to honor all of them. The opinion relied upon Article 44(5) of the Vienna Convention on the Law of Treaties, which permits a coerced state to maintain a treaty which it could treat as void under Article 52, but which states that "no separation of the provisions of the treaty is permitted." The opinion pointed out that if the United States affirmed the Accords but failed to implement part of them, serious consequences could result. For example, Iran might secure a determination of illegality from the Iran-United States Claims Tribunal, invoke the United States' "breach" as a ground for terminating the entire agreement, or otherwise implement some form of nonforcible reprisal against the United States.

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[35] A number of commentators have subsequently reached the same conclusion. *See, e.g.,* Note, *The Prohibition of the Use of Duress in Treaty Negotiations: A Study of the Iranian Hostage Crisis,* 7 B.C. Int'l & Comp. L. Rev. 135 (1984); Note, *The Iranian Hostage Agreement Under International and United States Law,* 81 Colum. L. Rev. 822, 826–41 (1981); Note, *Void Ab Initio: The U.S.-Iran Hostage Accords,* 21 Va. J. Int'l L. 347 (1981). Note, *The Effect of Duress on the Iranian Hostage Settlement Agreement,* 14 Vand. J. Transnat'l L. 847 (1981).

After more than a month of scrutiny, President Reagan announced on February 24, 1981, that his Administration had decided to "ratify" the Algiers Accords and the January 19, 1981, executive orders implementing them. *See* "Suspension of Litigation Against Iran," Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981), reprinted in 50 U.S.C. § 1701 note (Supp. V 1981). Rather than requiring the outright dismissal of the commercial claims being litigated in United States courts that would now properly be presented to the Iran-United States Claims Tribunal, the President "suspended" those claims, declaring them to "have no legal effect in any action now pending in any court of the United States." *Id.* If the Tribunal were to determine that it lacked jurisdiction over a particular claim, the suspension of that claim would terminate; if the Tribunal were to award some recovery or to determine that no recovery was due, that claim would be discharged for all purposes. *Id.*

Pursuant to the President's order, the Treasury Department amended the IACR to implement the United States' obligation to transfer the Iranian funds remaining in domestic accounts to Iran and the security account of the Iran-United States Claims Tribunal. *See* 46 Fed. Reg. 14,330 (1981). The amended regulations nullified any rights to those funds that had been previously acquired by judicial attachments, injunctions, or other methods, by the technique described in the OLC opinions of September 16, 1980, and October 8, 1980, discussed at pp. 95–98, *supra,* and the Attorney General opinion of January 19, 1981, discussed at pp. 104–05, *supra,* namely, withdrawal of all licenses for such judicial process granted after November 14, 1979. United States banks holding Iranian deposits were directed to turn them over to the Federal Reserve Bank of New York, but were not required to transfer those deposits until the United States government's authority to issue such a transfer order had been subjected to a definitive court ruling.

### J. Domestic Litigation Involving the Frozen Iranian Assets—After the Algiers Accords

In the weeks that followed, the pace of domestic litigation accelerated sharply. Two days after President Reagan ratified the Algiers Accords, the government filed renewed Statements of Interest across the country in hundreds of pending commercial suits against Iran, asking courts to comply with the President's executive order, to suspend the litigation before them, and to dissolve any attachments or preliminary injunctions that they might previously have entered in such litigation. A declaration by Secretary of State Alexander Haig that accompanied many of the Statements warned that "[i]f the United States should be prevented from freeing the Iranian assets from judicial restraints . . . the whole structure of the agreements may begin to crumble . . . ." Statement of Interest of the United States, *American Int'l Group, Inc.* v. *Islamic Republic of Iran,* Nos. 80–1779, 80–1891 (D.C. Cir. filed Feb. 26, 1981).

Under the terms of ¶ 6 of the Assets Agreement, the United States was obliged to return the Iranian funds remaining in American banks within six months after the conclusion of the Accords, namely, July 19, 1981. Recognizing that only the Supreme Court could definitively resolve the legality of the Accords under domestic law by that date, the government searched the federal courts for a claimant willing to petition the Court for a writ of certiorari. The most active litigation occurred in the Second Circuit, where 96 consolidated cases had been pending before Judge Kevin Duffy in the Southern District of New York prior to the conclusion of the Accords. The United States had sought to intervene in these cases in November 1980; Judge Duffy had denied leave to intervene and had certified an interlocutory appeal to the Court of Appeals for the Second Circuit on December 22. *See New England Merchants Nat'l Bank* v. *Iran Power Generation & Transmission Co.,* 508 F. Supp. 47 (S.D.N.Y. 1980) (Memorandum and order denying U.S. leave to intervene), 508 F. Supp. 49 (S.D.N.Y. 1980) (memorandum and order certifying questions for appeal). Following the conclusion of the Accords, the Second Circuit remanded the interlocutory appeal to Judge Duffy for reconsideration in light of changed circumstances, directing him to choose a representative case that squarely presented the most crucial issues. *See New England Merchants Nat'l Bank* v. *Iran Power Generation & Transmission Co.,* 646 F.2d 779 (2d Cir. 1981).

Before Judge Duffy issued his decision, however, the United States Court of Appeals for the First Circuit heard an expedited appeal in *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Auth.,* 651 F.2d 800 (1st Cir. 1981). On May 22, 1981, the First Circuit upheld the President's authority to conclude and implement the Accords, largely on grounds previously foreshadowed in the September 16, 1980, OLC opinions discussed at pp. 95–97, *supra.* In the process, the First Circuit reached four significant holdings. It held first, that IEEPA authorized the President to freeze the assets, to issue a revocable license whereby claimants could obtain qualified attachments against those assets, and then to revoke a licensed attachment and order the transfer of the frozen assets to the pre-freeze owner. *Id.,* at 801–09. Like the OLC opinion of October 8, 1980, discussed at pp. 97–98, *supra,* the First Circuit's opinion in *Main* relied heavily for this point on the Supreme Court's decision in *Orvis* v. *Brownell, supra.* Second, the court upheld the President's authority to suspend claims of United States nationals against Iran pending a determination by the Iran-United States Claims Tribunal. That power derived, the court held, not from IEEPA but from the President's authority under Article II of the Constitution, historically acquiesced in by Congress, to settle claims of United States nationals against foreign governments.[36] Third, the court concluded that plaintiffs' interest in their attachments was conditional and revocable and, therefore, that the President's nullification of those attachments could not give rise to a right to seek compensation from the United States in the Claims Court under the Tucker Act, 28 U.S.C. § 1491 (1976 & Supp. III 1979). Finally, the court dismissed plaintiffs' claim that the President's suspension of their claims constituted a taking without just compensation under the Fifth Amendment, holding that this claim was not ripe because it remained to be seen whether plaintiffs would actually suffer a loss if required to pursue their action before the Iran-United States Claims Tribunal.

On June 5, 1981, in *American Int'l Group, Inc.* v. *Islamic Republic of Iran,* 657 F.2d 430 (D.C. Cir. 1981), the United States Court of Appeals for the District of Columbia Circuit issued a decision concurring with each of the First Circuit's four principal holdings in *Main.* The D.C. Circuit's decision differed from that of the First Circuit in only one significant respect—two members of the panel concluded that the Hostage Act of 1868, *discussed in* note 8, *supra,* provided additional statutory authority for the President's action suspending the claims. *See* 657 F.2d at 449–52 (statement of McGowan, J., joined by Jameson, J.). In a brief separate statement, the third panel member expressed the contrary view, arguing that the legislative history of the Hostage Act demonstrated that it was intended only to authorize presidential acts short of war directed against the offending foreign government, not every domestic action deemed necessary to implement whatever agreement the President may have entered with that government. *See id.* at 452–53 (statement of Mikva, J.). *See also* Mikva & Neuman, *The Hostage Crisis*

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[36] The First Circuit majority also rejected plaintiffs' contention that the passage of the FSIA in 1976 had somehow limited the Executive's authority to settle claims against a foreign sovereign. Judge Breyer, concurring, eschewed reliance on constitutional authority, arguing instead that the President's power to suspend claims derived from IEEPA. *See* 651 F.2d at 817–18 (Breyer, J., concurring).

*and the "Hostage Act,"* 49 U. Chi. L. Rev. 292 (1982) (subsequently elaborating upon that argument).

Six days after the D.C. Circuit issued its decision, Judge Duffy issued a lengthy opinion reaching the opposite conclusion. In *Marschalk Co.* v. *Iranian Nat'l Airlines Corp.*, 518 F. Supp. 69 (S.D.N.Y. 1981), he concluded that IEEPA did not authorize the President to revoke the licensed attachments, nor did the Constitution nor any statute authorize the President to suspend claims and transfer them to the Iran-United States Claims Tribunal. Furthermore, he held that under the Fifth Amendment, claimants were entitled to compensation for the government's taking of their claims and attachments. Shortly after this opinion issued, the Second Circuit certified three crucial questions to the Supreme Court, involving the legality of the President's suspension of claims, the President's nullification of the attachments, and the claimants' entitlement to compensation in both cases.

Ironically, none of these early decisions received plenary Supreme Court review. A California claimant, Dames & Moore, bypassed review in the Ninth Circuit and sought an extraordinary writ of certiorari before judgment in the Supreme Court. As it has occasionally done when a case is of paramount national importance, *see, e.g., United States* v. *Nixon,* 418 U.S. 683 (1974); *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952), the Supreme Court granted the extraordinary writ on June 11, 1981, adopted an expedited briefing schedule, and heard argument less than two weeks later. *See Dames & Moore* v. *Regan,* 452 U.S. 932 (1981). On July 2, 1981, less than three weeks before the Iranian assets were scheduled to leave the country, the Court upheld the Government's position in virtually all particulars. *See Dames & Moore* v. *Regan,* 453 U.S. 654 (1981).

Writing for a unanimous Court on all but two issues,[37] Justice Rehnquist relied heavily on the decisions of the Courts of Appeals for the First and D.C. Circuits discussed above. The Court concluded that § 203 of IEEPA, 50 U.S.C. § 1702(a)(1), authorized the President to nullify the attachments and to order the transfer of the Iranian assets. *Id.* at 669–74. Because the President's action in nullifying the attachments and ordering the transfer was taken pursuant to express congressional authorization, it was "supported by the strongest of presumptions and the widest latitude of judicial interpretation," *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 637 (1952) (Jackson, J., concurring), which petitioner Dames & Moore had failed to overcome. Moreover, because petitioner's interest in those attachments was conditional and revocable, the President's action nullifying the attachments and ordering the transfer of the assets did not amount to a compensable taking. *See* 453 U.S. at 674, n. 6.

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[37] Justice Stevens argued that the Court need not decide whether the Court of Claims would later have jurisdiction to hear takings claims growing out of the implementation of the Accords. *See* 453 U.S. at 690 (Stevens, J., concurring in part). Justice Powell dissented from the holding that the nullification of the attachments did not effect a compensable taking, arguing that that question should have been left open for resolution on a case-by-case basis by the Court of Claims. *See id.* at 690 (Powell, J., concurring in part and dissenting in part).

The Court declined to hold that either IEEPA, *see id.* at 675, or the Hostage Act, *see id.* at 676–78, specifically authorized the suspension of claims, but found that both statutes were "highly relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action" in cases where the President has settled international claims by executive agreement. *Id.* at 677. Moreover, the Court agreed with the two circuit courts that by enacting the FSIA in 1976, Congress had not divested the President of his authority to settle claims. *Id.* at 684–86. Because "the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another" and because "Congress acquiesced in the President's action," *id.* at 688, the Court held that the suspension of the claims did fall within the President's powers under Article II.

Finally, the Court dismissed as not ripe the question whether any authorized suspension of the claims was compensable as a taking under the Fifth Amendment. Relying on a concession made at oral argument by the Solicitor General-designate, *see id.* at 689, the Court held that, notwithstanding the "treaty exception" to the jurisdiction of the Court of Claims, 28 U.S.C. § 1502, jurisdiction would later be available in that Court to decide the takings question. In short, in virtually all relevant respects, the Court's reasoning closely hewed to that set forth in the numerous OLC opinions issued throughout the fall of 1980, as well as that found in the Attorney General's January 19, 1981, opinion to the President.

## K. Aftermath

Although *Dames & Moore* v. *Regan* effectively resolved the most salient constitutional issues concerning the validity of the Algiers Accords, domestic litigation relating to the crisis has continued with respect to standby letters of credit, Iran's rights to the Shah's assets, the hostages' rights to sue Iran in United States courts, and the hostages' rights to recover against the United States for the alleged taking of their claims against Iran. *See* pp. 78–80 & 91–98, *supra.* Numerous commentators have subsequently attempted to evaluate the lessons of the Hostage Crisis, focusing, *inter alia,* on the effectiveness of the trade sanctions imposed, the efficacy of the extraterritorial application of the assets control regulations, and the breadth of the President's authority under IEEPA. *See, e.g.,* Feldman, *Implementation of the Iranian Claims Settlement Agreement,* in Private Investors Abroad—Problems and Solutions in International Business in 1981, at 75 (1981); Trooboff, *Implementation of the Iranian Settlement Agreements—Status, Issues, and Lessons: View from the Private Sector's Perspective,* in *id.* at 103.

Pursuant to the Algiers Accords, more than half of the 49 United States banks holding nonsyndicated debts of the Bank Markazi Iran have reached settlements in an amount totaling approximately $1.4 billion, which have been paid from the $1.418 billion escrow account at the Bank of England. In the meantime, the national emergency declared on November 14, 1979, by Executive Order No. 12,170 continues. In December 1983, the Department of the Treasury amended § 535.504 of the IACR, 31 C.F.R. § 535.504 (1983), to continue in effect indefinitely that section's prohibition on any final judgment or order by a United States court disposing of any interest of Iran in any standby letter of credit, performance bond, or similar obligation. The prohibition was extended specifically to allow claims involving letters of credit to be resolved definitively by the Iran-United States Claims Tribunal.

The Iran-United States Claims Tribunal, which has recently completed two and one-half years of operation, remains perhaps the most tangible and lasting legacy of the Hostage Crisis. *See* President's Message to the Congress Reporting on Recent Developments Regarding Declaration of National Emergency with Respect to Iran, 20 Weekly Comp. Pres. Doc. 640–41 (May 3, 1984). Under the Accords, claims could be filed with the Tribunal no earlier than October 21, 1981, and no later than January 19, 1982. In toto, some 3,835 claims were filed, the great majority of them claims by United States nationals against Iran. Of these, 520 were claims for $250,000 or more (so-called "large claims") where prosecution of the claim is being handled by private counsel; another 2,782 so-called "small claims" for less than $250,000 are being handled by the Legal Adviser's Office of the Department of State. As of October 1, 1984, the Tribunal had issued a total of 151 partial or final decisions from its caseload of close to 4,000 cases, and 111 awards in favor of United States claimants, totaling approximately $306 million. *See generally* Selby & Stewart, *Practical Aspects of Arbitrating Claims Before the Iran-United States Claims Tribunal,* 18 Int'l Law. 211 (1984); Stewart & Sherman, *Developments at the Iran-United States Claims Tribunal: 1981–1983,* 24 Va. J. Int'l L. 1 (1983).

As of October 1, 1984, the Tribunal has also adopted a "test case" approach for its cases involving small claims and has disposed of more than 25 percent of its pending claims of United States nationals involving larger amounts, leaving about 381 "large claims" on its docket. *See* Selby & Stewart, *supra,* 18 Int'l Law, at 251. As of this writing, about $720 million remains in the security account held at the Settlement Bank of the Netherlands, with some $350 million in the adjacent interest account. Although the Tribunal has made significant progress in arbitrating the claims before it, Iran has repeatedly sought to delay the arbitral process. It recently challenged the validity of a number of the Tribunal's awards to American claimants in the Dutch courts, then withdrew those challenges. Moreover, on September 3, 1984, two Iranian arbitrators physically assaulted a third-country arbitrator in an attempt to exclude him from the Tribunal, resulting in a temporary suspension of Tribunal proceedings. A special chamber has been established to consider requests for withdrawals or terminations of claims and for awards on agreed terms until regular proceedings are reestablished. While it is still too early to determine conclusively what lasting precedents the Tribunal will establish in the field of international commercial arbitration,[38] at its present pace it seems likely to continue in existence for the rest of this decade.

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October 1984

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[38] A body of literature has already begun to appear, however, on some of the Tribunal's important decisions to date. *See, e.g.*, Selby & Stewart, *supra;* Stewart & Sherman, *supra;* Stein, *Jurisprudence and Jurists' Prudence: The Iranian-Forum Clause Decisions of the Iran-U.S. Claims Tribunal,* 78 Am. J. Int'l L. 1 (1984); Jones, *The Iran-United States Claims Tribunal: Private Rights and State Responsibility,* 24 Va. J. Int'l L. 259 (1984); Lowenfeld, *The Iran-U.S. Claims Tribunal: An Interim Appraisal,* 38 Arb. J. 14 (1983); von Mehren, *The Iran-U.S.A. Arbitral Tribunal,* 31 Am. J. Comp. L. 713 (1983); Note, *The Standing of Dual Nationals Before the Iran-United States Claims Tribunal,* 24 Va. J. Int'l L. 698 (1984).

# Presidential Powers Relating to the Situation in Iran

**[The following memorandum was prepared in the hours immediately following the seizure of the United States embassy in Tehran. Its conclusions are set forth in its second paragraph.]**

**November 7, 1979**

## MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This memorandum addresses, on an urgent basis, possible responses to the situation in Iran.

Our conclusions are as follows:

1) The President may block Iranian assets upon the declaration of a national emergency under the International Emergency Economic Powers Act (IEEPA). An oil boycott would be such an emergency. This Act also provides authority to halt transactions including imports and exports.

2) Without declaration of an emergency, the President may prohibit or curtail the export of goods in situations threatening American national security or stated foreign policy goals under the Export Administration Act of 1979.

3) The President may restrict the movement of Iranian diplomatic and consular personnel and may take non-forcible reprisals.

4) Except in time of war the United States cannot intern Iranian nationals.

5) The President has the constitutional power to send troops to aid American citizens abroad. This power is subject to the consultation and reporting provisions of the War Powers Resolution.

### I. Authority to Impose Economic Controls

#### *A. The International Emergency Economic Powers Act*

The President has wide-ranging power to regulate direct foreign investment under the International Emergency Economic Powers Act, Pub. L. No. 95-223, title II, 50 U.S.C. §§ 1701-1706 (Supp. I 1977), enacted in 1977.

The Act authorizes the President, after declaration of a national emergency, to block all assets in the United States of Iran and Iranian nationals and to prohibit or regulate all importation or exportation of property in which Iran or Iranians have an interest.

The IEEPA provides in relevant part:

> Sec. 202. (a) Any authority granted to the President by section 203 may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.
>
> (b) The authorities granted to the President by section 203 may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this title and may not be exercised for any other purpose. Any exercise of such authorities to deal with any new threat shall be based on a new declaration of national emergency which must be with respect to such threat.
>
> Sec. 203. (a)(1) At the times and to the extent specified in section 202, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—
>
> (A) *investigate, regulate,* or *prohibit—*
>
> (i) *any transactions in foreign exchange,*
>
> (ii) *transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,*
>
> (iii) *the importing or exporting of currency or securities; and*
>
> (B) *investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest;*
>
> by any person, or with respect to any property, subject to the jurisdiction of the United States.

50 U.S.C. §§ 1701, 1702(a)(1). (Emphasis added.) [1] It is clear that once the President declares a national emergency under the IEEPA, he

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[1] The statute denies the President authority to regulate communications and most humanitarian activities. *Id.* § 1702(b).

assumes plenary control over all foreign assets subject to the jurisdiction of the United States, and he may regulate or prohibit movements of foreign or domestic currency or credit in and out of the country.

In the IEEPA, Congress (perhaps intentionally) left the definition of "national emergency" ostentatiously vague.[2] This may reflect either the difficulty of defining all possible situations which could constitute a national emergency or the recognition that what constitutes a national emergency is essentially a political question depending upon the felt necessities of a particular political context.

However, the legislative history indicates that an oil embargo could institute a national emergency.

During the markup of the bill in the Committee on International Relations, the following exchange between Representatives Solarz and Bingham, the latter being Chairman of the Subcommittee that considered the legislation, took place:

> Mr. Solarz. For argument sake, let us say there was another oil embargo. Would that constitute potentially the kind of nonwar national emergency?
>
> Mr. Bingham. I think quite clearly it would.
>
> Mr. Solarz. If it would, and the President declared a national emergency pursuant to such an embargo, could you explain in lay language what precisely he would be able to do under his powers? When it talks about regulating the controlling [sic] foreign assets, does that mean he could freeze the assets of the boycott [sic] of the country that established the embargo?
>
> Mr. Bingham. Correct, freeze but not seize. There is a difference.
>
> Mr. Solarz. So if he had money he could tie it up and say in effect when you lift the embargo, we will lift the freeze?
>
> Mr. Bingham. That is correct. He can regulate exports in a manner not regulated by the Export Administration Act.

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[2] See H.R. Rep. No. 459, 95th Cong., 1st Sess. 10 (1977):

> [G]iven the breadth of the authorities and their availability at the President's discretion upon a declaration of national emergency, their exercise should be subject to various substantive restrictions. The main one stems from a recognition that emergencies are by their nature rare and brief, and are not to be equated with normal, ongoing problems. A national emergency should be declared and emergency authorities employed only with respect to a specific set of circumstances which constitute a real emergency, and for no other purpose. The emergency should be terminated in a timely manner when the factual state of emergency is over and not continued in effect for use in other circumstances. A state of national emergency should not be a normal state of affairs.

**Mr. Solarz. Which means he could in effect establish an embargo on exports to that country?**

**Mr. Bingham. Correct.**

*Revision of Trading With the Enemy Act, Markup Before the House Comm. on International Relations,* 95th Cong., 1st Sess. 4 (1977).

Declaration of a national emergency under the IEEPA implicates provisions of the National Emergencies Act, Pub. L. No. 94–412, 50 U.S.C. §§ 1601–51. *See* H.R. Rept. No. 459 at 14 (1977). Section 204(d), 50 U.S.C. § 1703(d), provides that the consulting and reporting obligations placed on the President "are supplemental to those contained in title IV of the National Emergencies Act." And the National Emergencies Act states in no uncertain terms that "[n]o law enacted after the date of enactment of this Act shall supersede this title [concerning declaration of a national emergency and congressional power to terminate] unless it does so in specific terms, referring to this title, and declaring that the new law supersedes the provisions of this title." 50 U.S.C. § 1641. Thus, should the President declare a national emergency under the IEEPA arising out of an energy crisis, he must

> (a) transmit the declaration and a report justifying it to Congress and publish the declaration in the Federal Register (50 U.S.C. § 1703);
>
> (b) keep and transmit to Congress records of all executive orders, proclamations, rules, and regulations (*id.*, § 1641);
>
> (c) transmit to Congress every six months a report on expenditures directly attributable to the exercise of emergency authorities (*id.*);
>
> (d) report to Congress every six months actions taken in the exercise of the emergency authorities (*id.*, § 1703(c)).

Furthermore, the legislative veto provision of the National Emergencies Act, § 202(a)(1), applies to the President's declaration of a national emergency under the IEEPA; and § 207(b) of the IEEPA provides further that Congress may terminate the President's exercise of authority saved by IEEPA's grandfather clause, § 207(a)(1). President Carter noted his "serious concern" over the unconstitutionality of § 207(b) at the time he signed the IEEPA. Pub. Papers of Jimmy Carter 2187 (Dec. 28, 1977). We believe Congress may not constitutionally terminate the exercise of these authorities by passage of a concurrent resolution not submitted to the President pursuant to Article I, § 7 of the Constitution.

While the Act has not been used, the constitutionality of its predecessors has been upheld. *E.g., Nielsen* v. *Secretary of Treasury,* 424 F.2d 833 (D.C. Cir. 1970); *Pike* v. *United States,* 340 F.2d 487 (9th Cir. 1965); *Sardino* v. *Fed. Res. Bank,* 361 F.2d 106 (2d Cir.), *cert. denied* 385 U.S. 898 (1966).

### *B. Export Controls*

The new Export Administration Act of 1979 (Pub. L. No. 96-72, to be codified at 50 U.S.C. App. § 2401 *et seq.)* contains two separate grants of power to the President to prohibit or curtail the export of goods and technology that are subject to the jurisdiction of the United States. Both of these provisions state that the authority is to be exercised by the Secretary of Commerce by means of export licenses. The first provision, § 5(a), is meant to implement the Act's policy to restrict exports that "would make a significant contribution to the military potential of any other country . . . which would prove detrimental to the national security of the United States." (§ 3(2)(A)). The second provision is meant to implement the Act's policies to restrict exports "to the extent necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations," (§ 6(a)) a phrase that is apparently limited by an accompanying cross-reference to the Act's policies of securing removal of foreign restrictions on our supplies in certain circumstances, and of discouraging the provision of aid or sanctuary to international terrorists.

Either or both of these grants of power may prove responsive to the Iranian situation. The Act sets some substantive restrictions on presidential discretion that are not outlined above (e.g., he may not limit exports of medicines). It also includes complicated provisions for the Secretary to follow in issuing or denying licenses.

## II. Diplomatic and Consular Persons and Property

### *A. Rights of Iranian Diplomats*

The rights of diplomats are codified in the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502. The United States and Iran are both parties to the Convention.

Article 39 of the Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, provides that privileges and immunities continue even in case of armed conflict. The United States opposed this provision because it would preclude custody in wartime, 7 M. Whiteman, Digest of Int'l Law 441, but did not enter a reservation to it. The State Department Legal Adviser expressed the view during hearings on the convention that Article 26, which permits regulation of the travel of diplomats for reasons of national security, would permit custody. *Id.* at 442. Thus, it might be possible to place their diplomats in a situation akin to house arrest under Article 26. However, they would be free to leave the country. Article 44.

This conclusion is reinforced by the fact that it appears that Iran has been guilty of massive breach of its obligation under the Convention to protect United States diplomats and diplomatic property. A material breach of a multilateral treaty by one of the parties entitles a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting state. Vienna Convention on the Law of Treaties, Art. 60, Senate Exec. L., 92d Cong., 1st Sess. (1971).

### *B. Diplomatic Property*

The Diplomatic Convention further provides that the host state must respect and protect the premises of the mission together with its property and archives even if diplomatic relations are broken off. On the other hand a violation of a treaty obligation, as of any other obligation, may give rise to a right "to take non-forcible reprisals." *Commentary on Vienna Convention on Law of Treaties,* [1966]. 2 Y.B. Int'l L. Comm'n 169, 253–54. We make no recommendation as to what an appropriate reprisal may be.

### *C. Consular Offices*

The Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, United States-Iran, 8 U.S.T. 899, T.I.A.S. No. 3853, provides for protection of consular officers (Art. XIII) and for the normal privileges and immunities. In addition, both the United States and Iran are parties to the subsequent Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820. The Consular Convention includes provisions for protection of consular posts comparable to those in the Diplomatic Convention (Arts. 26, 27, 34 and our observations would similarly apply.)

## III. Iranian Nationals

The President has statutory authority to intern or expel enemy aliens. However, this power is available only in time of war or invasion, 50 U.S.C. § 21, and thus cannot be invoked at present. The Supreme Court has held this provision constitutional. *Ludecke* v. *Watkins,* 335 U.S. 160 (1948).

The Supreme Court has also upheld the constitutionality of curfews and exclusion orders directed solely at persons of Japanese ancestry (including American citizens) during World War II, *Korematsu* v. *United States,* 323 U.S. 214 (1944); *Hirabayashi* v. *United States,* 320 U.S. 81 (1943). The court invalidated detention orders as beyond the statutory authority of the War Relocation Authority without reaching the constitutional issues. *Ex Parte Endo,* 323 U.S. 283 (1944).

These orders were authorized by a statute which was repealed in 1976. Section 501(e) of P.L. No. 94–412, the National Emergencies Act. No comparable statute exists today.

## IV. Use of Troops

### A. Constitutional Power

It is well established that the President has the constitutional power as Chief Executive and Commander-in-Chief to protect the lives and property of Americans abroad. This understanding is reflected in judicial decisions, *e.g., Durand* v. *Hollins,* 8 Fed. Cas. 111 (No. 4186) (C.C.S.D.N.Y. 1860) quoted in The Constitution of the United States: Analysis and Interpretation 562–63 (1973), and recurring historic practice which goes back to the time of Jefferson. *E.g.,* Borchard, The Diplomatic Protection of Citizens Abroad 448–53 (1915). This power has been used conspicuously in recent years in a variety of situations. These include: landing troops in the Dominican Republic to protect the lives of citizens believed to be threatened by rebels (1965), the Danang sealift during the collapse of Vietnam defense (1975), the evacuation of Phnom Penh (Cambodia, 1975), the evacuation of Saigon (1975), the *Mayaguez* incident (1975), evacuation of civilians during the civil war in Lebanon (1976), and the dispatch of forces to aid American victims in Guyana (1978).

### B. The War Powers Resolution

The War Powers Resolution, 50 U.S.C. § 1541 *et seq.,* does not limit the President's power to act in this instance. Its consultation and reporting requirements are, however, both triggered by situations which involve the introduction of armed forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated. *See* 50 U.S.C. §§ 1542, 1543.[3] In addition, reporting to Congress is also required by the Resolution when armed forces are sent to a foreign country equipped for combat, or when they are sent in numbers which substantially enlarge the forces equipped for combat already in a foreign nation. *See* 50 U.S.C. § 1543.

The Resolution includes in its statement of purposes and policy a list of situations in which the President is authorized to introduce the armed forces into hostilities or situations of imminent hostility. *See* 50 U.S.C. § 1541(c). Protection of American citizens abroad is not there mentioned. However, we do not consider that the purpose and policy statement should be construed to constrain the exercise of the President's constitutional power in this instance.

First, the Resolution's policy statement is not a comprehensive or binding formulation of the President's powers as Commander-in-Chief.

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[3] There have been, since the enactment of the Resolution, four instances of protection and evacuation where its provisons applied. *See War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident, Hearings Before the Subcommittee on International Security and Scientific Affairs of the House Comm. on International Relations,* 94th Cong., 1st Sess. (1975).

*See* H. Conf. Rep. 547 93d Cong., 1st Sess. 8 (1973) (stating that subsequent sections of the Resolution are not dependent on the policy statement). Moreover, Senator Javits, Senate Manager of the Conference Bill, when asked whether the President has "authority to act unilaterally to rescue American nationals in danger abroad who might be found in the midst of rebellion or the threat of war," replied:

> I think the normal practice which has grown up on that is that it does not involve such a utilization of the forces of the United States as to represent a use of forces, appreciably, in hostilities so as to constitute an exercise of the war power or to constitute a commitment of the Nation to war.

119 Cong. Rec. 33,558 (1973). In view of this "normal practice," it would seem that the failure in the Resolution's statement of purpose and policy to list the recognized Presidential power of protecting American citizens abroad is itself an indication that the list therein was not meant to be exhaustive.[4]

Finally, the Resolution itself disclaims any intent to alter the constitutional power of the President, such as has been discussed in this memorandum, *see* 50 U.S.C. § 1547(d)(1), and it probably could not.

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[4] *See* Franck, *After the Fall: The New Procedural Framework for Congressional Control Over the War Power*, 71 Am. J. Int'l L. 605, 613, 626 (1977).

# Supplementary Discussion of the President's Powers Relating to the Seizure of the American Embassy in Iran

**Under the Vienna Convention on Diplomatic Relations, diplomats are not subject to any form of arrest or detention even in case of armed conflict, though their movements may be restricted. Iran's conduct might be invoked in this case as a ground for suspending the Convention, in which case non-forcible reprisals against its diplomats in this country may be used.**

**The President may use his constitutional power to protect Americans abroad, subject to the consultation and reporting requirements of the War Powers Resolution. While not unconstitutional on their face, these requirements may have applications which raise constitutional questions insofar as they limit the President's power as Commander-in-Chief.**

**The International Emergency Economic Powers Act and the National Emergencies Act together authorize the blocking of Iranian assets and the subsequent licensing of particular transactions. These statutes specify the procedures to be followed in the event such a course is followed.**

November 11, 1979

## MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

In response to your request we are providing additional details on some of the matters discussed in our memorandum of November 7, 1979.

### I. Treatment of Iranian Diplomats in the United States

The Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, ratified by Iran, the United States and all major countries of the world, codifies the law in this area. It is assumed to be self-executing and thus part of domestic law as well.[1] Article 29 provides that a diplomat shall not be liable to any form of arrest or detention. Immunity continues even in case of armed conflict (Art. 39.2). The United States vigorously opposed the latter provision at the time of drafting, stating that it was unrealistic and did not represent universal practice. The delegation pointed out that almost every government involved in World War II placed restrictions of some kind on the movement of enemy diplomats and the withdrawal of their property. The United States proposed an amendment which might well have applied here. It would have authorized the host state in time of national emergency, civil strife, or armed conflict to institute appropriate measures of control with respect to mission funds and persons enjoying privileges and immunities and their property, including protective custody to insure their safety. It was defeated, however, by a vote of 38 to 6 with 26 abstentions. 7 M. Whiteman, *Digest of Int'l Law* 441.

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[1] *See, e.g.*, Letter from Assistant Attorney General Dixon to the Acting Legal Adviser, May 4, 1973, in the 1973 Digest of United States Practice in Int'l L. 143, 144. The enactment of the Diplomatic Relations Act, P.L. 95-393, 22 U.S.C. § 254a *et seq.* (Supp. II 1978), does not affect this conclusion. The Act does not purport to apply to stituations covered by the Convention but complements the Convention by prescribing rules for non-parties and for matters not covered explicity in the Convention, such as liability insurance.

Despite this record there are a number of approaches which can be used to mitigate the prohibition mentioned.

### *A. Protective Custody*

Article 26 makes freedom of travel subject to "laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security." The domestic legislative history of the Convention shows that "protective custody" could be justified under this provision. The State Department Legal Adviser testified before the Senate Foreign Relations Committee that this provision could be used in situations involving armed conflict to justify placing diplomats in protective custody. He pointed out that while Article 29 prohibits arrest, it also provides that the host state shall take appropriate steps to prevent attacks on a diplomat's person, freedom, and dignity. 7 M. Whiteman, *supra* at 442. Article 26 is not limited to times of armed conflict. It is, in fact, used on an ongoing basis to restrict travel of foreign diplomats particularly where their countries impose restrictions on United States diplomats. Despite the reference to "laws and regulations" in Article 26, the State Department informs us that there is no special procedure for imposing such restrictions. The appropriate embassy is merely informed of the restrictions.

The protective custody approach has one distinct advantage in that it may not technically constitute an arrest and authority can be gleaned from the text and domestic legislative history of the Convention. As we show below, it may be that we are no longer bound by the inhibition of Article 29 against arrest. This would, however, merely eliminate the prohibition; it would not, in itself, provide a valid ground under domestic law for arrest which presumably could then be challenged for illegality as any other arrest may be.

### *B. Reciprocity*

Article 47.2(a) permits us to apply any of the provisions of the Convention restrictively because of a restrictive application of a provision to our embassy in Iran. It may, of course, be something of a misnomer to describe the conduct of the occupiers of the American embassy as a "restrictive" application. Since that government appears, however, to have adopted this conduct as its own, we would appear justified in similarly restricting the movement of Iranian diplomats.

The Diplomatic Relations Act, *supra* note 1, reinforces the use of Art. 47 by similarly providing for restriction of immunity:

> The President may, on the basis of reciprocity and under such terms and conditions as he may determine, specify privileges and immunities for members of the mission, their families, and the diplomatic couriers of any sending state which result in more favorable treatment or less favorable treatment than is provided under the Vienna Convention.

22 U.S.C. § 254c. The legislative history shows that this was intended to be used as a tool to respond to arbitrary treatment of American diplomats:

> The conditions under which U.S. diplomatic personnel carry out their official functions and lead their lives in certain hardship areas dictate their enjoyment of increased protection from harassment as a result of arbitrary application of local law. This provision permits less favorable treatment than the Vienna Convention and covers those cases where certain nations restrict the privileges and immunities of U.S. diplomatic personnel abroad. Any use of the discretion described in this section must be on a reciprocal basis with the nations involved.

S. Rep. No. 958, 95th Cong. 2d Sess. 5 (1978).

### *C. Suspension of Convention for Breach*

The discussion above has proceeded on the assumption that the Convention is still in force. There has, however, been a material breach on the part of the Iranians' treaty obligation to protect our embassy and diplomats. In such a case, the United States may invoke the Iranian conduct as a ground for suspending the operation of the Convention in whole or in part as far as the Iranians are concerned. Vienna Convention on the Law of Treaties, Art. 60, Senate Exec. L., 92d Cong., 1st Sess. (1971).[2] In such a case we can consider ourselves not bound by the provisions pertinent to the situation at hand, such as immunity from detention or arrest, or from the whole Convention, should the President choose. As noted earlier, however, this would not by itself provide a valid legal basis for arrest but merely remove immunity from arrest. Although the Convention provides for the right to leave the country, this could be suspended as well, particularly since Americans are being denied that right in Iran.

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[2] This treaty is not yet in force and has not been ratified by the United States. It is, however, generally cited as evidencing contemporary practice in this field. *Cf. Charlton* v. *Kelly*, 229 U.S. 447, 473 (1913).

### *D. Reprisals for Breach*

International law recognizes that, beyond suspending the effect of the treaty, "non-forcible" reprisals may be used in the case of breach. *Commentary on Vienna Convention on Law of Treaties,* [1966] 2 Y. B. Int'l L. Comm'n 169, 253–54, U.N. Doc. A/CN.4/SER.A/1966/Add.1.[3] These reprisals may properly relate to the rights of the Iranians under the Convention. *Ibid.*

In evaluating possible reprisals, it is useful in a modern sense to think of them as a method of communication:

> Reprisals are usually employed when words alone cannot influence the other party's decision and make it discontinue what it is doing. They are subordinated to particular objectives and are used in limited selective, exemplified, and incrementary ways. Reprisals should be distinguished from mere acts of vengeance or of destroying the opponent's capabilities. Rather, they are part of a political-diplomatic strategy for resolving and reconciling conflicting interests. As such, communicative signals are built into them. The success of a reprisal may be judged by whether it exerts the desired influence on the target, whether it stands by itself or is part of a credible threat to expand the conflict further, if necessary. An effective reprisal, therefore, while seeking to narrow some of the adversary's alternatives, should keep other alternatives open. This may be best achieved when retaliatory acts are understood to form part of a comprehensive strategy that combines negative sanctions with positive inducements.

David, The Strategy of Treaty Termination: Lawful Breaches and Retaliations 234 (Yale Univ. Press, 1975).

At the present time we are not aware of specific facts which, under United States law, would justify arrest of individual Iranian diplomats even if there were no bar to their arrest under international law for the reasons specified. If they could be shown to be part of a conspiracy (18 U.S.C. § 371) to damage government property (18 U.S.C. § 1361) there may be a basis. The Neutrality Act and other statutes involving crimes against foreign governments or foreign property are generally directed to the protection of foreign states. 18 U.S.C. § 951 *et seq.*

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[3] The term "non-forcible" would appear to mean not involving the use of armed force as prohibited by Art. 2.4 of the U.N. Charter rather than merely placing someone under arrest. The law of reprisal of an earlier period was not so restricted. 2 Oppenheim's Int'l Law 114 (Lauterpacht ed. 1935); 7 Moore, Int'l Law Digest 119 (1906). This does not, of course, limit the President's right to use force to directly free the hostages.

### II. Use of Armed Forces Abroad

As we noted, the President may use his constitutional power to protect Americans abroad subject to the consultation and reporting provisions of the War Powers Resolution. 50 U.S.C. § 1541 *et seq.*

*A. Consultation Requirement*

The consultation requirement focuses on the use of troops in hostile situations:

> The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

50 U.S.C. § 1542.

(1) On its face consultation is required with "Congress." This language replaced an earlier version which merely required consultation with the leadership and appropriate committees of Congress. H. Conf. Rep. No. 547, 93d Cong. 1st Sess. 8 (1973); H. Rep. No. 287, 93d Cong. 1st Sess. 6 (1973). Nevertheless, as a practical matter consultation with any more than a select group of congressional leaders has never been attempted. During the *Mayaguez* incident, about ten House and eleven Senate members were contacted concerning the measures to be taken by the President. On the House side these included the Speaker, the majority and minority leaders, and the chairman and ranking minority members of the House Committee on International Relations. Testimony of State Department Legal Adviser Monroe Leigh in *War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident, Hearings before the Subcommittee on Int'l Security and Scientific Affairs of the House Comm. on Int'l Relations,* 94th Cong. 1st Sess. 78 (1975) (hereafter *War Powers: A Test of Compliance*). The present Administration has acknowledged that there are practical limits to the consultation requirement and has said that meaningful consultations with "an appropriate group of congressional representatives should be possible." Statement of State Department Legal Adviser Hansell before the Senate Foreign Relations Committee reprinted in State Department Bulletin, August 29, 1977 at 291, 292.

(2) A determination must also be made as to when hostilities exist that require consultation. President Ford took the position, for example, that no consultation was legally required at the Danang or Lebanon evacuations because hostilities were not involved. Franck, *After the*

*Fall: The New Procedural Framework for Congressional Control Over the War Power,* 71 Am. J. Int'l L. 605, 615 (1977) (hereafter Franck). The State and Defense Departments have said that "hostilities" means a situation in which American forces are actively exchanging fire with opposing units and "imminent hostilities" means a situation where there is a serious risk from hostile fire to the safety of U.S. forces. Neither term was thought to encompass irregular or infrequent violence which may occur in a particular area. *War Powers: A Test of Compliance* at 38–39.

(3) In requiring consultation in "every possible instance," Congress meant to be firm yet flexible. H. Rep. No. 287, *supra,* at 6.

> The use of the word "every" reflects the committee's belief that such consultation *prior* to the commitment of armed forces should be inclusive. In other words, it should apply in extraordinary and emergency circumstances—even when it is not possible to get formal congressional approval in the form of a declaration of war or other specific authorization.
>
> At the same time, through use of the word "possible" it recognizes that a situation may be so dire, e.g., hostile missile attack underway, and require such instantaneous action that no prior consultation will be possible.

*Id.* (Emphasis in original.)

This Administration has pointed out the problem that exists in emergencies, noting that "[B]y their very nature some emergencies may preclude opportunity for legislative debate prior to involvement of the armed forces in hostile or potentially hostile situations." It has recognized, however, that consultation may be had "in the great majority of cases." Statement of Legal Adviser Hansell, *supra.*

(4) There may be constitutional considerations involved in the consultation requirement. When President Nixon vetoed the Resolution he did not suggest that either the reporting or consultation requirements were unconstitutional. Department of State Bulletin, November 26, 1973, at 662–64. Neither the Ford nor Carter administrations have taken the position that these requirements are unconstitutional on their face.[4] Nevertheless, there may be applications which raise constitutional questions. This view was stated succinctly by State Department Legal Adviser Leigh:

> Section 3 of the War Powers Resolution has, in my view, been drafted so as not to hamper the President's exercise of his constitutional authority. Thus, Section 3 leaves it to the President to determine precisely how

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[4] The only provision that this Administration has suggested presents constitutional problems related to the right of Congress to act by concurrent resolution. *See* 123 Cong. Rec. 21,897 (1977).

> consultation is to be carried out. In so doing the President may, I am sure, take into account the effect various possible modes of consultation may have upon the risk of a breach in security. Whether he could on security grounds alone dispense entirely with "consultation" when exercising an independent constitutional power, presents a question of constitutional and legislative interpretation to which there is no easy answer. In my personal view, the resolution contemplates at least some consultation in every case irrespective of security considerations unless the President determines that such consultation is inconsistent with his constitutional obligation. In the latter event the President's decision could not as a practical matter be challenged but he would have to be prepared to accept the political consequences of such action, which might be heavy.

*War Powers: A Test of Compliance* at 100.

### *B. Reporting Requirements*

The reporting requirements apply to situations not only where hostilities are taking place or imminent (which requires consultation), but where armed forces are sent to a foreign country equipped for combat. 50 U.S.C. § 1543. The report must be filed within 48 hours. This has been interpreted as meaning 48 hours from the time that they are "introduced" into the situation triggering the requirement and not from the time that the decision to dispatch them is made. *E.g.,* Franck at 615. The report must include:

> (A) the circumstances necessitating the introduction of United States Armed Forces;
>
> (B) the constitutional and legislative authority under which such introduction took place; and
>
> (C) the estimated scope and duration of the hostilities or involvement.

Reports which have been filed in the past have been brief and to the point; they have not run more than one or two pages. The reference to legal authority has been one sentence, referring to the constitutional power as Commander-in-Chief and Chief Executive. *See War Powers: A Test of Compliance* at 75 *(Mayaguez); The War Powers Resolution, Relevant Documents, Correspondence, Reports,* Subcomm. on Int'l Security and Scientific Affairs, House Comm. on Int'l Relations, 94th Cong., 1st Sess. 40 (Danang); 42 (Phnom Penh) (Comm. Print 1975).

## III. Blocking Assets of Iranians

The President may direct the Treasury Department to block assets of Iranians and to subsequently license particular transactions as desired. This power is provided by the International Emergency Economic Powers Act (the Act), P.L. 95-223, 91 Stat. 1626, 50 U.S.C. § 1701 *et seq.* (Supp. I 1977), in tandem with the National Emergencies Act, 50 U.S.C. § 1601. Neither Act has been invoked before, although there are well-established precedents for employing such controls under similar prior authority. *E.g., Sardino* v. *Federal Reserve Bank,* 361 F.2d 106 (2d Cir.), *cert. denied,* 385 U.S. 898 (1966) (blocking Cuban assets). *See generally* 42 Op. Att'y Gen. 363 (1968).

If this course is to be followed, the following steps must be taken immediately:

(1) *Consultation with Congress:* The consultation requirement tracks that found in the War Powers Resolution (discussed in Part II, *supra*) and presumably can be interpreted in much the same way. 50 U.S.C. § 1703. Security is, of course, necessary since advance warning will assist persons potentially affected in evading controls by withdrawing assets from banks or removing currency from the country. Unlike the situation involving the War Powers Resolution, the President cannot argue here that he is exercising a constitutional power and thus avoid statutory restrictions.

(2) *Declaration of a National Emergency:* A proclamation of national emergency is necessary to use the powers available under the Act. 50 U.S.C. § 1701. The President is authorized to declare one pursuant to the National Emergencies Act. 50 U.S.C. § 1621. For purposes of the Act such an emergency may be declared with respect to any unusual and extraordinary threat to the national security, foreign policy, or economy of the United States which has its source outside this country. 50 U.S.C. § 1701. This language was left broad to provide necessary discretion. H. Rep. No. 459, 95th Cong., 1st Sess. 10 (1977). We believe that the present emergency meets the language of the statute.

A declaration can be short and to the point. The President in this case could state: "I find that the situation in Iran constitutes an unusual and extraordinary threat to the national security, foreign policy and economy of the United States and hereby declare a national emergency."[5] The courts will not review a determination so peculiarly within the province of the President. *See* 42 Op. Att'y Gen. at 370.

(3) *Designation of Act:* In the same proclamation or by contemporaneous or subsequent executive orders, the President must designate the particular emergency statute he wishes to invoke—The International

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[5] *See* Proc. 4074, 7 Weekly Comp. Pres. Doc. 1174 (August 15, 1971) ("I hereby declare a national emergency during which I call upon the public and private sector to make the efforts necessary to strengthen the international economic position of the United States").

Emergency Economic Powers Act. This is a requirement of the National Emergencies Act. 50 U.S.C. § 1631. We see no reason why this should not be done in the same document that declares a national emergency.

(4) *Delegation:* Since the statute vests powers directly in the President, any order should delegate power to an appropriate official. 3 U.S.C. § 301. Presumably this would be the Secretary of the Treasury who already administers similar programs. The President could in the order (a) declare an immediate freeze by prohibiting the transactions listed in the Act including transactions in foreign exchange, transfers of credit and payments between banking institutions, and importing and exporting of currency in which any Iranian has an interest and (b) delegate to an appropriate official the powers to make exceptions and to administer the freeze and enforce the Act. *Compare* Exec. Order No. 11387, "Governing Certain Capital Transfers Abroad," 33 Fed. Reg. 47 (1968). This would avoid any enforcement gap between the issuance of the Proclamation and implementation of the regulations by Treasury.[6]

(5) *Publication and Transmittal to Congress:* The National Emergencies Act requires that the emergency proclamation be immediately transmitted to Congress and published in the Federal Register. 50 U.S.C. § 1621.

(6) *Report to Congress:* Following the issuance of the order, the President shall "immediately" transmit a report to the Congress specifying:

> (a) the circumstances which necessitate such exercise of authority;
>
> (b) why the President believes those circumstances constitute an unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States;
>
> (c) the authorities to be exercised and the actions to be taken in the exercise of those authorities to deal with those circumstances;
>
> (d) why the President believes such actions are necessary to deal with those circumstances; and
>
> (e) any foreign countries with respect to which such actions are to be taken and why such actions are to be taken with respect to those countries.

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[6] We have been shown a proposal which is limited to freezing funds of Iranian students, which contemplates an effective date one week from issuance of the executive order. This would not seem to accomplish its purpose since it would enable students to draw funds from banking institutions in anticipation of the ban. Moreover, it is not clear whether the banks could effectively administer an initial freeze limited to students since they may not have records to show just which Iranian accounts belong to students. It should be noted, however, that if the students were to withdraw funds from the banks following the effective date, they would be committing a federal crime in doing so. 50 U.S.C. § 1705.

50 U.S.C. § 1703(b).

The legislative history indicates that this requirement was not to impede use of emergency power. The House report notes:

> Nothing in this section should be construed as requiring submission of a report as a precondition of taking action where circumstances require prompt action prior to or simultaneously with submission of a report.

H. Rep. No. 459, *supra* at 16. This provision is modeled on the War Powers Resolution. As indicated in Part II above, the practice under that resolution is to file very brief reports.

**John M. Harmon**  
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*Office of Legal Counsel*

# Immigration Laws and Iranian Students

**The President has authority under the Immigration and Nationality Act (INA) to limit or halt entry of Iranian nationals into the United States. He also has available to him under that statute a number of options by which he may regulate the conditions under which Iranian nationals already present in the country remain here or depart.**

**While the matter is not free from doubt, a reasonable reading of § 241(a)(7) of the INA would allow the Attorney General to take into account adverse foreign policy consequences in determining whether an alien's continued presence in the United States is prejudicial to the public interest, so as to render him or her deportable. However, it would be constitutionally inappropriate to identify members of the class of deportable persons in terms of their exercise of First Amendment rights.**

**Both the INA and the Constitution require that all persons be given a hearing and an opportunity for judicial review before being deported; however, neither the INA nor the Constitution would preclude the Attorney General or Congress from taking action directed solely at Iranian nationals, particularly in light of the serious national security and foreign policy interests at stake in the present crisis.**

**November 11, 1979**

## MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

**This memorandum has been prepared by this Office and the Immigration and Naturalization Service (INS) General Counsel's office. It addresses the statutory provisions regarding entry and deportation of aliens as they pertain to Iranian nationals in the United States. It also examines the constitutional authority of Congress to enact legislation affecting Iranians residing in, or attempting to enter, this country. We conclude: (1) that the President presently possesses the authority to halt entry of Iranians into the United States; (2) that, while the matter is largely unprecedented and would raise nonfrivolous constitutional questions, the Attorney General may be able to promulgate standards which which would render deportable aliens whose presence in this country is prejudicial to the public interest and threatens the conduct of foreign affairs; (3) that the immigration laws and the Constitution require that all persons receive a hearing and judicial review before being deported; (4) that it is therefore unlikely that deportations could be effected with sufficient immediacy to have an impact on the present crisis in Tehran; (5) that the Attorney General could require all Iranian nonimmigrant students to demonstrate to the INS that they are "in status" (*i.e.,* not deportable); (6) that regulations and statutes directed solely at Iranian**

nationals would not violate the Constitution; and (7) that Congress has the authority to bar from entering and to deport Iranians.

### I. Population of Iranians

Iranian nationals in the United States may fall into four categories: (1) lawful permanent residents; (2) nonimmigrants; (3) parolees; and (4) aliens in the United States in violation of law.

Lawful permanent residents as defined in § 101(a)(20) of the Immigration and Nationality Act (INA or Act), 8 U.S.C. § 1101(a)(20), are aliens who have entered legally with immigrant visas or who have adjusted status while in the United States. A lawful permanent resident may remain in the United States indefinitely unless he commits misconduct covered by the deportation grounds set forth in § 241(a) of the Act, 8 U.S.C. § 1251(a).

Nonimmigrants are aliens within one of the twelve categories specified in § 101(a)(15) of the Act, 8 U.S.C. § 1101(a)(15). Generally, nonimmigrants are admitted for a particular purpose for a period of time, and under such conditions as the Attorney General may specify. § 214(a) of the INA, 8 U.S.C. § 1184(a). As of August 30, 1979 there were approximately 130,000 nonimmigrants from Iran in the United States. Of these, approximately 50,000 were nonimmigrant students as defined in § 101(a)(15) of the Act, 8 U.S.C. § 1101(a)(15).

A few Iranians may be in the United States as parolees who were allowed to enter temporarily for emergency reasons or for reasons deemed strictly in the public interest in accordance with the authority of the Attorney General under § 212(d)(5) of the Act, 8 U.S.C. § 1182(d)(5). Parolees are not considered to have been "admitted" to the United States and may be ordered to depart in an exclusion proceeding rather than a deportation proceeding.

Iranians who entered the country illegally or who have failed to maintain nonimmigrant status would be considered to be here in violation of law and would be *prima facie* deportable.

### II. Present Policy Toward Iranians

As a result of discussions between the State Department and the Justice Department following the fall of the Shah, INS has instituted a practice of granting "extended voluntary departure" to Iranians in the United States who may be out of status but who have expressed an unwillingness to return to Iran.[1] An alien granted extended voluntary departure is effectively permitted to stay in this country for an undetermined period of time. In addition, INS has deferred inspection of potentially excludable Iranians who claim political asylum. On the basis of representations made by the State Department, the foregoing policies have been extended until June 1, 1980. Therefore, no Iranians are currently being deported from the United States against their will. Iranians who have been allowed to remain under these policies may be granted work authorization by the INS. At present, approximately 4,400 Iranians have been granted extended voluntary departure under the INS policy.

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[1] Iranians who have been convicted of crimes within the United States are not included in this policy.

The original rationale for the policy of not enforcing departure was that the State Department was unsure about conditions in Iran following the fall of the Shah's government. By not taking a position with respect to involuntary return of Iranians, the State Department believed that it would have an opportunity to allow the situation in Iran to stabilize. In addition, claims for asylum were not determined because it was believed that statements regarding the likelihood of persecution in Iran may have had an adverse impact on the establishment of diplomatic relations with the new Iranian government.

It should also be noted that since January 1, 1979, all nonimmigrant students, including Iranians, have been eligible for "duration of status" under INS regulations. 8 C.F.R. § 214.2(f)(2) (1979). A student admitted for "duration of status" has no date specified for the expiration of his stay, but may remain for so long as he continues to be a full-time student in good standing at his school.

## III. Statutory Entry and Deportation Procedures

The INA provides elaborate procedures regarding entry and expulsion of aliens. As discussed below, several of the procedures are constitutionally required.

### *A. Entry*

Immigrants may be admitted into the United States if they possess a valid visa and are not otherwise excludable under § 212 of the INA, 8 U.S.C. § 1182. Section 212 lists 33 grounds for exclusion including insanity, drug addiction, pauperism, conviction of a crime involving moral turpitude, prostitution, false procurement of documentation or fraud, advocacy of anarchism and communism, or engaging in subversive activities. Nonimmigrants (*e.g.*, students, visitors, consular officials, foreign press) are admitted upon conditions and for such time as established by regulations by the Attorney General. § 214 of the INA, 8 U.S.C. § 1184.

Aliens seeking entry are inspected by immigration officers who may detain for further inquiry aliens "who may not appear . . . to be clearly and beyond a doubt entitled" to enter. § 235(b) of the INA, 8 U.S.C. § 1225(b). Such further inquiry occurs before a special inquiry officer (immigration judge), who is authorized to administer oaths, present and receive evidence, examine and cross-examine the alien or witnesses.

The alien is entitled to representation by counsel, and a complete record of the proceedings must be kept. §§ 235, 236, 292 of the INA, 8 U.S.C. §§ 1225, 1226, 1362. A decision excluding an alien may be appealed to the Board of Immigration Appeals, an independent quasi-judicial appellate body created by the Attorney General within the Department of Justice. 8 C.F.R. § 3.1. Board decisions in exclusion cases are reviewable in federal district court by habeas corpus.

The INA gives the President authority to "suspend the entry of all aliens or any class of aliens as immigrant or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate" upon a finding that entry "would be detrimental to the interests of the United States." § 212(f) of the INA, 8 U.S.C. § 1182(f). *See also* § 215(a)(1) of the INA, 8 U.S.C. § 1185(a)(1), as amended by Pub. L. No. 95-426, § 707, 92 Stat. 992 (1978).

### *B. Deportation*

The INA specifies 19 grounds for deportation of aliens. These include excludability at time of entry, conviction of a crime involving moral turpitude, advocacy of anarchism or communism, involvement in narcotic use or sale, and failure to maintain status or to comply with any condition of status. A deportable alien may be arrested upon a warrant of the Attorney General and held in custody or released on bond. Most deportation cases are initiated by the issuance of an order to show cause without the issuance of a warrant of arrest. At the ensuing deportation proceeding, conducted by a special inquiry officer, the alien is entitled to notice of the charges against him and of the time and place of the proceedings, to counsel, and to an opportunity to examine the evidence against him, present evidence in his own behalf and cross examine government witnesses. § 242 of the INA, 8 U.S.C. § 1252. The Government has the burden of proving deportability by clear, convincing, and unequivocal evidence. *Woodby* v. *INS*, 385 U.S. 276 (1966). The decision of the special inquiry officer is appealable to the Board of Immigration Appeals (BIA). Thereafter, judicial review is available in the court of appeals. § 106(a) of the Act, 8 U.S.C. § 1105 (a). Any alien held in custody under an order of deportation may also obtain judicial review through habeas corpus proceedings.

Most of the statutory provisions establishing hearing rights are constitutionally required. Since at least 1903, it has been recognized that the Due Process Clause of the Constitution applies to deportation proceedings. The *Japanese Immigrant Case*, 189 U.S. 86, 100-02 (1903). *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 49-51 (1950); *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 596-98 (1953). While Congress may have plenary authority to determine what classes of aliens must leave the United States, see below, deportable aliens may not be expelled without a hearing. However, the provision of a right of appeal to the BIA and then to a federal court of appeals is not constitutionally required.

### *C. Claims for Asylum*

An alien in either exclusion or deportation proceedings may apply for asylum under INS regulation if he claims that he would be persecuted in his home country on the basis of race, religion, nationality, political opinions, or membership in a particular social group. 8 C.F.R. § 105 (1979). *See also* § 243(h) of the Act, 8 U.S.C. § 1253(h).

## IV. Grounds for Deportation and Exclusion Under Current Law

### *A. Deportation*

#### 1. Lawful permanent resident aliens

Potential grounds for deportation of Iranian nationals presently in the United States are contained in two subsections of the INA. § 241(a)(4) and (7) of the INA, 8 U.S.C. § 1251(a)(4), (7). Section 241(a)(4) provides for the deportation of an alien who within 5 years after entry into the United States is convicted of a crime involving moral turpitude and is sentenced to a year or more in prison, or who is convicted of two crimes involving moral turpitude at any time after entry. This section would become operative, for example, if an Iranian national is convicted of committing a crime of violence in this country.

Section 241(a)(7), 8 U.S.C. § 1251(a)(7), provides for the deportation of an alien who has engaged in, or has the purpose of engaging in, activities described in § 212(a)(27) of the INA, 8 U.S.C. § 1182(a)(27). Section 212(a)(27) renders excludable any alien who the Attorney General has reason to believe seeks to enter the United States to engage in activities "which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States." The BIA has indicated, in dicta, that § 212(a)(27) "is broad enough to apply to others than subversives." *Matter of McDonald and Brewster,* 15 I&N Dec. 203, 205 (BIA 1975) (refusing to bar entry of persons carrying six marijuana cigarettes).[2] In that decision, the Board interpreted § 212(a)(27) to bar entry of persons who seek to engage in activities "inimicable to the internal security of the United States." *Id.* This Office has opined that this section would authorize the exclusion of six Rhodesian officials seeking to enter the United States to attend an agricultural convention; such entry was arguably deemed prejudicial to this nation's conduct of foreign affairs.

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[2] *See In the Matter of M.,* 5 I&N Dec. 248 (BIA 1953) (refusing to bar entry of pacifist under § (a)(27)).

The scope of § 241(a)(7) is unclear. The leading treatise states that the section's "expansive and undefined power has not yet been invoked in any actual case." 1A Gordon & Rosenfield, Immigration Law and Procedure § 4.10c, at p. 4–93 (1979). A reasonable reading of the section, supported by its legislative history, would allow the Attorney General to take into account serious adverse foreign policy consequences in determining whether an alien's stay here is prejudicial to the public interest. Arguably, the Attorney General, perhaps upon advice from the Secretary of State, could determine that the presence of particular Iranian nationals severely injures the ability of this country to conduct foreign policy and threatens the maintenance of public order. The question is not free from doubt, however. Although this Office has opined heretofore that a broad reading of this statute is warranted, a substantial argument can be made that the "public interest" ground for deporting aliens was intended by Congress to give the Attorney General the power to deport only where the *conduct* of the alien is inimical to the public interest, rather than where his *presence* is thought prejudicial to the United States. If that reading of the statute is correct,[3] then the operation of this provision would require a determination of the type of activity that is cause for deportation. We have serious doubt whether the identification of the class of deportable persons could be made to turn on their exercise of First Amendment rights. Thus it would probably not be constitutionally appropriate to identify for deportation all those aliens who have participated in marches or demonstrations advocating the death or extradition of the Shah. *Cf. Harisiades* v. *Shaughnessy,* 342 U.S. 580, 592 (1952); *Dennis* v. *United States,* 341 U.S. 494, 502 (1951); *In the Matter of M., supra,* 5 I&N Dec. at 252. In short, while this section appears to give the Attorney General wide discretion in determining who may remain in the United States, it may be difficult to establish appropriate guidelines for its implementation.

2. Nonimmigrants

A nonimmigrant is subject to the same grounds of deportation under § 241(a)(4) and (7) as discussed above. In addition, a nonimmigrant who has remained beyond the length of his authorized stay may be deported as an overstay under § 241(a)(2) of the Act. However, as noted above, since January 1, 1979, all nonimmigrant students, including Iranians, have been admitted without a specified departure date and may remain as long as they continue to be students in good standing with their schools.

Examples of violations of status are working without authorization or performing other activities which are inherently inconsistent with the purpose for admission. However, the Board of Immigration Appeals has held that the test for students under § 241(a)(9) is whether the student's actions have meaningfully interrupted his studies. *Matter of Murat-Kahn* 14 I&N Dec. 465 (BIA 1973). This view has been endorsed by at least one appellate court. *Mashi* v. *INS*, 585 F.2d 1309 (5th Cir. 1978). Therefore, under current law the mere fact of arrest, even when followed by incarceration, does not automatically terminate a student's status.

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[3] The Supreme Court has held that deportation provisions should be strictly construed. *Fong Haw Tan* v. *Phelan,* 333 U.S. 6, 10 (1948).

### 3. Illegal entrants

An Iranian who entered the United States with an improper visa or without inspection would be deportable under §§ 241(a)(1) or (2).

### *B. Exclusion*

Assuming that an Iranian seeking to enter the United States as an immigrant or a nonimmigrant had a proper visa, the relevant exclusion grounds would be §§ 212(a)(27) and (29), 8 U.S.C. § 1182(a)(27), (29). Section 212(a)(27) relates to aliens seeking to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States. This statutory language may have broad applicability as discussed above. Section 212(a)(29)(A) covers certain subversive activities and would be narrower in scope than § 212(a)(27).

## V. Executive Branch Options Under Present Statutory Authority

### *A. Procedural Options*

### 1. Deportation

Nonimmigrants who are out of status are deportable. However, expeditious deportation of these persons may not presently be possible because of practical problems in identifying and locating them. Even if out-of-status persons are found, deportation proceedings, and subsequent BIA and judicial review, take on the average 1 year.[4] Since a deportation hearing is constitutionally required, and judicial review is provided by statute, it will be difficult to expedite proceedings. The BIA, which is created by regulation, could be eliminated, although such action could sacrifice uniformity of and control over deportation proceedings. The Attorney General could order increased investigation of the status of Iranian nonimmigrants and order the INS and BIA to assign priority to deportation proceedings against such aliens. It should be recognized, however, that the Constitution and the INA prevent any summary deportation of Iranian nationals.

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[4] The INS estimates that this involves two months at the INS district office, four months at the BIA, and six months in the court of appeals.

2. Entry

The INA gives the President broad authority to prescribe regulations conditioning or limiting entry of aliens, or any class of aliens. §§ 212(f), 215 of the INA, 8 U.S.C. §§ 1182(f), 1185. In addition to substantive limits on entry, discussed below, these provisions could authorize the President to establish special screening procedures for Iranian nationals to probe their reasons for entry and activities they plan to undertake in the United States. Such regulations must meet the test of "reasonableness"; presumably they could be justified if the President has information that Iranian terrorists or other persons intending to undertake violent action in this country are seeking entry.

*B. Substantive Options*

1. Entering aliens

a. *Change conditions of stay.* Under the authority of § 214(a), the INS published proposed regulations in August, 1979, which would make conviction for commission of a violent crime for which a sentence of one year or more could be imposed a violation of nonimmigrant status. In addition, the proposed regulations would make the provision of truthful information to the INS a condition of a nonimmigrant's stay in the United States. These regulations could be put into effect by some time in December, 1979. The INS expects that student groups will challenge these regulations on the ground that they add deportation grounds not provided by Congress.

b. *Presidential order under §§ 212(f) and 215(a).* Under §§ 212(f) and 215(a) of the Act, the President could declare that the admission of Iranians or certain classes of Iranians would be detrimental to the interests of the United States. Such a restriction would have to meet the test of reasonableness. Given the present uncertainty of the situation in Iran, the possible internal problems and violence which could be caused by Iranians demonstrating in the United States, and the difficulty in providing security for Iranians in the United States, such an order would probably be sustainable.

2. Aliens in the United States

Under § 214 of the Act, the Attorney General could promulgate a regulation requiring all nonimmigrant students to appear at INS offices and demonstrate they have maintained status.[5] The justification for such a regulation could be the necessity of securing an accurate count of nonimmigrant students in the United States and reexamining their period of stay in light of recent events. It may be difficult to justify the inclusion of nonimmigrant students other than Iranians. It should be noted that such action would be likely to overburden INS offices since there are several hundred thousand nonimmigrant students in the United States. Furthermore, locating and prosecuting persons who do not appear would be difficult and resource-consuming.

A more limited option would be to require only Iranian nonimmigrant students to appear at INS offices. Such a regulation could be justified upon information that substantial numbers of Iranian students are out of status. However, it would produce the same practical problems as the broader regulation (there are 50,000 nonimmigrant Iranian students).

3. Restrictions on departure

Under § 215 the President could restrict the departure of Iranians from the United States. However, this would seem to serve no useful purpose under the present circumstances.

### *C. Equal Protection and Iranians*

Several of the options outlined above single out Iranian nationals for special treatment—*i.e.,* a bar on entry of Iranians, special screening procedures, requirements that Iranian nonimmigrants report to INS district offices. Arguably, new requirements based on national origin raise equal protection concerns.

It is not likely that a court would invalidate any of the proposed actions on the ground that they violated the Fifth Amendment.[6] While the States may not discriminate on the basis of alienage without demonstrating a compelling State interest, *see Graham* v. *Richardson,* 403 U.S. 365 (1971), and aliens in the United States are protected by the due process guarantee of the Fifth Amendment, *Wong Yang Sung* v. *McGrath,* 339 U.S. 33, 48–51 (1950), the federal government has plenary power to legislate on immigration matters. The Supreme Court has recognized that Congress may deny entry to, or require deportation of, aliens on grounds which would be impermissible if applied to American citizens. *See The Chinese Exclusion Case,* 130 U.S. 581 (1889); *Galvan* v. *Press,* 347 U.S. 522 (1954); *Oliver* v. *INS,* 517 F.2d 426, 428 (2d Cir.

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[5] The "good cause" exception to the Administrative Procedure Act would have to be invoked to permit promulgation of the regulation without notice and comment. 5 U.S.C. § 553.

[6] Federal regulation of immigration is tested by the Fifth Amendment, which essentially incorporates the Fourteenth Amendment's guarantee of equal protection. *See Hampton* v. *Mow Sun Wong,* 426 U.S. 88, 99–101 (1976); *Bolling* v. *Sharpe,* 347 U.S. 497 (1954).

1975) (per curiam), *cert. denied,* 423 U.S. 1056 (1976). Congress' plenary power is based on the fact that entry and deportation classifications are "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy,* 342 U.S. at 588–89. *See Fong Yue Ting* v. *United States,* 149 U.S. 698 (1893); *Hitai* v. *INS,* 343 F.2d 466 (2d Cir.), *cert. denied,* 382 U.S. 816 (1965).

Some cases suggest in dicta that judicial review may be available to overturn classifications for which no rational basis can be found—*e.g.,* deportation on the grounds of religion. *Fiallo* v. *Bell,* 430 U.S. 787, 793, n.5 (1977); *Oliver* v. *INS, supra,* 517 F.2d at 428. But such review would clearly be limited to whether the lines drawn by Congress or the Executive branch are rational and not wholly arbitrary. *See Francis* v. *INS,* 532 F.2d 268 (2d Cir. 1976); *Noel* v. *Chapman,* 508 F.2d 1023, 1028 (2d Cir.), *cert. denied,* 423 U.S. 824 (1975).

Under this standard, we believe that the options outlined above would be constitutional. Given the present crisis, the activities of many Iranian nonimmigrant students, and the serious national security and foreign policy interests at stake, it is unlikely that a court would set aside otherwise legitimate policies directed solely at Iranian nationals.

Nor do we believe that any new regulations would be set aside if challenged as an instance of unconstitutional "selective enforcement." First, we assume that usual processing of aliens for entry and deportation would continue. Second, courts have traditionally recognized broad prosecutorial discretion in the enforcement of the law. While some cases have stated in dicta that a policy of prosecutions based on an unjustifiable and arbitrary standard such as race or religion may be unconstitutional, *e.g., Oyler* v. *Boles,* 368 U.S. 448, 456 (1962), we believe that heightened enforcement efforts aimed at out-of-status Iranian nonimmigrants would not be so arbitrary as to deny such persons due process. We believe that the President could make appropriate statements justifying such policies based on the international crisis, and upon a finding that many Iranian students (who constitute the largest foreign student group in the United States) may be out of status. *See United States* v. *Sacco,* 438 F.2d 264, 271 (9th Cir.), *cert. denied,* 400 U.S. 903 (1970).[7]

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[7] While we know of no case on point, we believe that any prosecutions undertaken to stifle the exercise of First Amendment rights by Iranian students might face a serious constitutional challenge. *Cf. Lennon* v. *INS,* 527 F.2d 187, 195 (2d Cir. 1975).

## VI. The Power of Congress

The preceding sections have discussed the authority of the President and the Attorney General under existing statutes. This section addresses the constitutional limitations on congressional authority to regulate entry and deportation of aliens.

It is well-established that "over no conceivable subject is the legislative power of Congress more complete than it is over" the regulation of immigration. *Kleindienst* v. *Mandel,* 408 U.S. 753, 766 (1972) (quoting *Oceanic Navigation Co.* v. *Stranahan,* 214 U.S. 320, 339 (1909)). The Supreme Court has consistently upheld the plenary power of Congress to make rules for the admission and deportation of aliens as inherent in the concept of national sovereignty. *The Chinese Exclusion Cases, supra; the Japanese Immigrant Case, supra; Ekiu* v. *United States,* 142 U.S. 651, 659 (1892). In recent years the Supreme Court has steadfastly refused to reconsider its earlier cases or to develop substantive limits on Congress' power to exclude and deport. *See Fiallo* v. *Bell,* 430 U.S. at 792–93; *Kleindienst* v. *Mandel,* 408 U.S. at 766; *Galvan* v. *Press,* 347 U.S. at 531–32 ("[T]hat the formulation of . . . policies [regarding entry and deportation] is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.")

The Supreme Court has also made clear that Congress may deport persons for prior conduct which did not render them deportable at the time they so acted. The retroactivity of such legislation does not violate the Due Process Clause or constitute an *ex post facto* law. *Lehmann* v. *Carson,* 353 U.S. 685 (1957); *Galvan* v. *Press, supra; Ng Fung Ho* v. *White,* 259 U.S. 276, 280 (1922). As stated most broadly by the Court:

> The basis for the deportation of presently undesirable aliens resident in the United States is not questioned and requires no reexamination. When legally admitted, they have come at the Nation's invitation, as visitors or permanent residents, to share with us the opportunities and satisfactions of our land. As such visitors and foreign nationals they are entitled in their persons and effects to the protection of our laws. So long, however, as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders.
>
> Changes in world politics and in our internal economy bring legislative adjustments affecting the rights of various classes of aliens to admission and deportation . . . . Since "[i]t is thoroughly established that Congress has power to

> order the deportation of aliens whose presence in the country it deems hurtful," the fact that petitioners, and respondent . . . , were made deportable after entry is immaterial. They are deported for what they are now, not for what they were. Otherwise, when an alien once legally became a denizen of this country he could not be deported for any reason of which he had not been forewarned at the time of entry. Mankind is not vouchsafed sufficient foresight to justify requiring a country to permit its continuous occupation in peace or war by legally admitted aliens, even though they never violate the laws in effect at their entry. The protection of citizenship is open to those who qualify for its privileges. The lack of a clause in the Constitution specifically empowering such action has never been held to render Congress impotent to deal as a sovereign with resident aliens.

*Carlson* v. *Landon,* 342 U.S. 534–37 (1952) (footnotes omitted) (quoting *Bugajewitz* v. *Adams,* 228 U.S. 585, 591 (1913)).

Thus, Congress possesses almost unlimited power in establishing substantive regulations defining categories of aliens who may enter and who must leave the United States. Congress clearly has the power to bar all Iranians from entering the United States and could order all Iranian nationals out of the country. Of course, such legislation raises serious policy issues: many Iranian nationals in this country may be loyal to the United States or the Shah and may be well-integrated members of American society with jobs and families. Furthermore, some Iranians may face persecution in Iran and thus would apply for asylum here.

Nor do we believe, as discussed above, that legislation directed solely at Iranians would offend the Fifth Amendment, as long as there was a rational basis for such legislation.[8]

Accordingly, Congress could constitutionally adopt, for example, legislation:

(1) barring entry of Iranians; and/or
(2) deporting all Iranian nonimmigrant students.

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[8] "[W]hether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress. Courts do enforce the requirements imposed by Congress upon officials in administering immigration laws, *e.g., Kwock Jan Fat* v. *White,* 253 U.S. 454, and the requirement of Due Process may entail certain procedural observances. *E.g., Ng Fung Ho* v. *White,* 259 U.S. 276. But the underlying policies of what classes of aliens shall be allowed to enter and what classes of aliens shall be allowed to stay, are for Congress exclusively to determine even though such determination may be deemed to offend American traditions and may, as has been the case, jeopardize peace.

*Harisiades* v. *Shaughnessy,* 342 U.S. at 597 (Frankfurter, J., concurring).

It must be noted, however, that while Congress has broad substantive power to define categories of admissible and deportable persons, its power to eliminate *procedural* protections is substantially limited by the Due Process Clause of the Constitution. As discussed above, the Supreme Court held consistently since the turn of the century that aliens may not be deported without a prior hearing. Recent decisions enlarging due process rights probably guarantee an alien (1) adequate notice of the hearing, (2) the right to present evidence and cross-examine witnesses, (3) representation by counsel, and (4) an unbiased decisionmaker. And while Congress may eliminate or limit the scope of review of deportation proceedings in the courts of appeals, it is unlikely that it could deprive aliens of the right to file habeas corpus petitions asserting deprivations of due process and other constitutional rights. U.S. Const. art. I, § 9, cl. 2. *See* 2 Gordon and Rosenfield, *supra,* § 8.6a (1979). Thus, while Congress could order that all Iranian nonimmigration students leave the United States, it could not deprive such aliens of a hearing to demonstrate that they do not come within the proscribed category. *Japanese Immigration Case, supra.*

Congress may be able to expedite expulsion of deportable aliens, such as out-of-status students, by providing for additional immigration officers and judges who could help locate and process such persons. However, the requirement of a hearing and the availability of habeas corpus review would prohibit any summary proceedings and render unlikely, as a practical matter, any immediate gain in the speed of enforcement of the existing law.

## VII. Conclusion

There exists a rather broad range of actions that could be taken both by the Executive Branch and by the Congress in this area. Necessarily, however, any action would have to be carefully scrutinized based upon the facts in existence at the time of any proposed action and the strength of the national security and foreign affairs interests. Because of the sensitive and important First Amendment, equal protection and due process considerations likely to be implicated by any action taken by the government, and given the high likelihood of litigation, we urge that any proposal be given careful and thorough consideration.

JOHN M. HARMON
*Assistant Attorney General*
*Office of Legal Counsel*

# Presidential Implementation of Emergency Powers Under the International Emergency Economic Powers Act

**The President may issue a single executive order invoking the remainder of his powers under the International Emergency Economic Powers Act, in response to the situation in Iran, which would permit him to block the property of Iranian citizens as well as that of their government, and to effect a complete trade embargo. The President may delegate the exercise of all implementing powers to the Secretary of the Treasury. Such an order need not declare a new emergency, but could simply find that the underlying emergency continues, and such an order need not be accompanied by an immediate report to Congress.**

November 21, 1979

## MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This responds to your question of November 14, 1979, whether future actions under the International Emergency Economic Powers Act (IEEPA) (50 U.S.C. §§ 1701–06 (Supp. I 1977)) that are not within the scope of Executive Order No. 12,170 3 C.F.R. 457 (1979) can be authorized by a single executive order invoking all the statute's powers and granting the Secretary of the Treasury discretion to take any particular action, or whether there must be a separate executive order for each incremental step. Executive Order No. 12,170, "Blocking Iranian Government Property," confines itself to blocking the property of "the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran." The IEEPA also includes authority to limit or prohibit any transfer of property subject to U.S. jurisdiction in which a foreign national has an interest. § 1702(a). This would authorize blocking the property of Iranian citizens as well as that of their government, and a complete trade embargo.[1] If the President determines that the authority to make these rather basic policy decisions should be delegated to the Secretary of the Treasury, we believe that delegation could be legally accomplished by issuing a single executive order authorizing use of the IEEPA's remaining provisions, and that a blanket delegation of implementing authority to the Secretary would be consistent with the statute.

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[1] The legislative history of the Export Administration Act of 1979, Pub. L. No. 96–72, 93 Stat. 503, 50 U.S.C. App. § 2401 *et seq.*, makes clear that total trade embargoes are to be accomplished under the IEEPA, rather than by export controls. *See* the conference report, 125 Cong. Rec. 26,593 (1979). Partial embargoes can, of course, be accomplished through export control.

Two preliminary points should be made. First, there should be no need for further declarations of national emergency while the present crisis exists. The IEEPA allows the exercise of "any authority" under its substantive grants in § 1702 once an emergency is declared to deal with an external threat to the national security, but requires a new declaration for a "new threat." § 1701. This reflects purposes the IEEPA shares with the National Emergencies Act, 50 U.S.C. § 1601–51, to prevent the indefinite duration of national emergencies and to provide Congress an opportunity to terminate any particular emergency by concurrent resolution. S. Rep. No. 466, 95th Cong., 1st Sess. 2 (1977). The statute and its history provide little help in defining what is a "new threat" requiring a new declaration of emergency, beyond the general purpose of preventing emergencies from surviving long past their initiating cause. The situation in Iran seems clearly to constitute a single, continuing emergency.

Second, the Emergencies Act requires the President to specify "the provisions of law under which he proposes that he, or other officers will act." 50 U.S.C. § 1631. Such a specification is to be made in the declaration of emergency or in "one or more contemporaneous or subsequent executive orders published in the Federal Register and transmitted to Congress." *Id.* Invocation of emergency powers other than those in the IEEPA to deal with Iran would thus require a new executive order specifying the statutes involved.

The IEEPA appears to assume that the President will take a series of implementing actions under a single declaration of national emergency, and that not all of these need be done by executive order. First, under § 1701(a), "any authority" granted by § 1702 may be exercised to deal with a particular threat. Second, the powers granted in § 1702 are phrased in a fashion that contemplates a series of different actions: "the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise [take authorized substantive actions]." Third, the requirement in § 1703(b) to report to Congress on the exercise of "any of the authorities" of the Act is clearly tied to the initial declaration of an emergency, and is followed in § 1703(c) by a requirement for follow-up reports at least each six months, describing actions taken under the statute and important new information. Fourth, § 1704 delegates broad power to the President to "issue such regulations, . . . as may be necessary" to implement the Act. And fifth, the Emergencies Act, 50 U.S.C. § 1641, requires the President to keep a file of his significant orders, "including executive orders," and requires each executive agency to keep a file of its rules, issued pursuant to an emergency. These are then to be transmitted promptly to Congress. § 1641(b).

The Emergencies Act contemplates subdelegation of presidential functions in two provisions mentioned above (§§ 1631, 1641(a–b)). The

IEEPA does not explicitly authorize subdelegation, but there is implicit support for it in the existence of rulemaking power and in references to a number of implementing actions (*e.g.*, "licenses" in § 1702(a)(1)). Nothing in the statute or its history suggests the unavailability of the President's general powers of subdelegation under 3 U.S.C. §§ 301-02, which allow delegation of "any function which is vested in the President by law" to a cabinet member (§ 301), "if such law does not affirmatively prohibit delegation. . . ." (§ 302.)

We therefore conclude that the President may issue a single executive order invoking the remainder of his powers under the IEEPA, and delegating their exercise to the Secretary of the Treasury. Such an order could find that the underlying emergency continues and necessitates the invocation of all powers remaining under the IEEPA. It could then restate the penultimate sentence of Executive Order No. 12,170, with the appropriate changes (italicized here): "The Secretary is authorized to employ all powers granted to me by the International Emergency Economic Powers Act *regarding the property of Iran or Iranian nationals.*" It does not appear to be necessary to accompany such an order with an immediate report to Congress, for reasons stated above.

JOHN M. HARMON
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*Office of Legal Counsel*

# The President's Authority to Force the Shah to Return to Iran

The Shah cannot be extradited to Iran, since the United States has no extradition treaty with Iran; however, §§241(a)(7) and 212(a)(27) of the Immigration and Nationality Act (INA) would permit the Attorney General to deport the Shah if his presence in this country were determined to be prejudicial to the public interest.

On its face, §243(a) of the INA appears to permit the Attorney General to force the Shah, upon deportation, to return to Iran; however, §243(h) of the INA and applicable principles of international law would preclude the Attorney General's forcing anyone to return to a country where he or she would be subject to political persecution, as the Shah would be if deported to Iran.

November 23, 1979

## MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

Among the questions that have arisen in informal conversations during recent days is the issue whether the President has the authority to repatriate the deposed Shah of Iran. Under the decided cases there is doubt about the President's legal authority to compel the Shah to return to Iran.

The Shah cannot be extradited to Iran. The President cannot order any person extradited unless a treaty or statute authorizes him to do so. "[T]he power to provide for extradition . . . is not confided to the Executive in the absence of treaty or legislative provision." *Valentine* v. *United States ex rel. Neidecker*, 299 U.S. 5, 8 (1936).[1] The United States has no extradition treaty with Iran, *see* 18 U.S.C. §3181 note, and the applicable statute authorizes extradition only when "there is a treaty or convention for extradition between the United States and [a] foreign government." 18 U.S.C. §3184.[2]

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[1] *Valentine* involved an effort to extradite *American citizens* to a foreign country, but for several reasons the case should be read to limit efforts to extradite any person. First, the language and reasoning of the case are almost uniformly broad enough to apply to all extraditions. Second, so far as we are aware, no lower court has ever read *Valentine* to hold that the President has greater power to extradite aliens than he does to extradite citizens. *See, e.g., Argento* v. *Horn*, 241 F.2d 258, 259 (6th Cir. 1957). Third, the *Valentine* Court rested its holding on "the fundamental consideration that the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law." *Id.* at 9. It is now clear, although it may not have been at the time of *Valentine*, that aliens as well as citizens are deprived of their "individual liberty"—at least for purposes of the Due Process Clause—when they are forced to leave the United States. *See, e.g., Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 49–50 (1950).

[2] Even if *Valentine* permits the President to extradite an alien without affirmative authority from a treaty or statute, *see* note 1 *supra*, this statute, by authorizing extradition only to nations with whom the United States has a treaty, arguably denies the President the power to extradite in all other cases.

The President can have the Shah deported and forced to return to Iran. Section 241(a)(7) of the Immigration and Nationality Act, referring to § 212(a)(27), provides that "[a]ny alien in the United States . . . shall, upon the order of the Attorney General, be deported who . . . is engaged . . . in any . . . activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States." 8 U.S.C. §§ 1251(a)(7), 1182(a)(27). It is unclear whether the Shah's merely being in the United States, and accepting medical care, amounts to an "activity" within §§ 241(a)(7) and 212(a)(27). Although the issue is not free from doubt, we believe that the better view, adopted by previous opinions of this Office, is that presence alone can constitute an "activity" under these sections. By causing the lives of American hostages to be threatened, the Shah's presence probably is "prejudicial to the public interest" if indeed it does not "endanger the welfare [or] safety . . . of the United States." In addition, this Office has previously expressed the view that serious harm to the Nation's conduct of foreign affairs constitutes prejudice to the public interest within the meaning of these provisions.[3] Thus §§ 241(a)(7) and 212(a)(27) permit the Attorney General to deport the Shah.

If the Shah is deported, § 243(a) of the Act, 8 U.S.C. § 1253(a), appears on its face to empower the Attorney General to force him to return to Iran. Section 243(a) provides that a deported alien is to be sent to a country he designates, "unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States." If the Attorney General believed that allowing the Shah to leave the United States for a nation other than Iran would endanger the lives of American hostages or harm American foreign policy, he could exercise his discretion to reject the Shah's designation.[4] If an alien's designation is not observed, "deportation of such alien shall be directed to any country of which such alien is a subject, national, or citizen if such country is willing to accept him into its territory." § 243(a), 8 U.S.C. § 1253(a).[5]

Section 243(h) of the Immigration and Nationality Act, however, provides that

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to

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[3] Specifically, in 1977 this Office concluded that the Attorney General had the power to exclude trade representatives of the illegal Rhodesian government on the grounds that their activities would adversely affect American foreign policy interests and that even allowing them to enter the country would violate our obligations under a Security Council Resolution.

[4] See our interpretation of parallel language—"prejudicial to the public interest"—in §§ 241(a)(7) and 212(a)(27), which authorize deportation.

[5] If the Shah has been stripped of his Iranian citizenship, and is no longer an Iranian national, § 243(a) still gives the Attorney General ample authority to deport him to Iran. *See, e.g.*, § 243(a)(3), (7), 8 U.S.C. § 1253(a)(3), (7).

> persecution on account of race, religion, or political opinion . . . .

8 U.S.C. § 1253(h). Courts have consistently followed the unvarying practice of the Attorney General, *see Matter of Dunar,* 14 I.&N. Dec. 310, 322 n.20 (1973), and interpreted § 243(h) not just to authorize but to *require* the Attorney General not to deport an alien to a country where he is likely to be persecuted. *See, e.g., Kovac* v. *INS,* 407 F.2d 102, 104 (9th Cir. 1969); *U.S. ex rel. Dolenz* v. *Shaughnessy,* 206 F.2d 392, 395 (2d Cir. 1953); 1 Gordon & Rosenfield, Immigration Law and Procedure 5–178, 5–179 (1979). The Multilateral Protocol Relating to the Status of Refugees, which binds the United States, confirms this interpretation. It provides:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[6]

"Refugee" is defined, in part, as:

> any person who . . . owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality. . . .[7]

Thus the Protocol allows the Attorney General no discretion[8] to deport a refugee to a territory "where his life or freedom would be threatened" by political persecution.[9]

The only remaining issue, under both the Protocol and § 243(h), is whether the Shah would be "persecuted" on account of "political opinion" if he were returned to Iran. In other cases courts have generally deferred to the conclusion of the Immigration and Naturalization Service (INS)—the Attorney General's delegate—on this issue, but that has been because the only dispute was factual; the alien asserted, and the INS denied, that the alien would be harmed or punished by the country to which the INS proposed to deport him.

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[6] Article 33, United Nations Convention Relating to the Status of Refugees, 185 U.N.T.S. 150, 176 (1954), incorporated in the Protocol, 19 U.S.T. 6223, T.I.A.S. No. 6577 (1968).

[7] Article 1 of United Nations Convention, *supra* note 6.

[8] The Protocol does specify that "[t]he benefit of [this protection] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is . . ." Article 33 of the U.N. Convention, *supra* note 6. It is unlikely that "danger to the security" of the asylum country should be interpreted to include threats made, in an effort to obtain the refugee, by the country which wants to persecute him; such an interpretation would in effect allow the very nation from which the refugee needs protection to nullify that protection. This point is not entirely clear, however, and a colorable argument can be made from the language itself that the Protocol would authorize the President to return the Shah. This issue should be reviewed with those at the State Department who have had experience with matters of this sort.

[9] The legislative history of the ratification of the Protocol suggests that the Senate understood Article 33 to make little change in prevailing law under § 243(h), but this understanding was based on the consistent interpretation of § 243(h) as requiring, and not just authorizing, the Attorney General to withhold the deportation of likely victims of persecution. *See Matter of Dunar,* 14 I. & N. Dec. 310 (1973). On this basis, the courts and the Immigration and Naturalization Service have held that the requirements of § 243(h) are substantially the same as those of Article 33. *See id.* at 322–23; *Kashani* v. *INS,* 547 F.2d 376, 379 (7th Cir. 1977).

The facts about the reception the Shah would receive in Iran are fairly clear, however, so in this case the issue would become basically one of law—whether "persecution on account of . . . political opinion" correctly characterizes the actions the Iranian government has promised to take. In dealing with this question of law courts have interpreted the language themselves and have been reluctant to defer to the INS's interpretations. *See, e.g., Kovac* v. *INS,* 407 F.2d 102, 104–07 (9th Cir. 1969); *Sovich* v. *Esperdy,* 319 F.2d 21, 25–29 (2d Cir. 1963). And under the standards that have developed, what the Iranian government proposes to do would almost certainly qualify as persecution on account of political opinion. Courts have found, for example, that a threatened prosecution constituted persecution when it was politically motivated and when the procedures would be irregular or capricious. *See, e.g., Coriolan* v. *INS,* 559 F.2d 993, 1000–04 (5th Cir. 1977) (Tuttle, J.; Coleman, J., dissenting). In general, if an alien can establish that he is likely to be punished upon his return, courts have allowed him to be deported only if the punishment is for an "ordinary crime" of the sort that might be punished under any regime and that has no overtly political import. *See, e.g., MacCaud* v. *INS,* 500 F.2d 355, 359 (2d Cir. 1974); *Kalatjis* v. *Rosenberg,* 305 F.2d 249, 252 (9th Cir. 1962). If a policy decision were made to press for the Shah's deportation to Iran, it could be argued that Iran wants to punish the Shah not for his opinions but for his actions. But apparently those same actions, if taken to promote a different political view or cause, would not now be a crime in Iran; this is probably sufficient to make the Shah's prospective punishment "persecution on account of . . . political opinion." *See, e.g., Coriolan* v. *INS, supra; Ross* v. *INS,* 440 F.2d 100, 101 (1st Cir. 1971). For these reasons, on the facts available at this time, we believe that the Attorney General lacks the authority to require the Shah to return to Iran.

Larry A. Hammond
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*Office of Legal Counsel*

# The President's Authority to Take Certain Actions Relating to Communications from Iran

**The President has statutory and constitutional authority, subject to First Amendment limitations, to limit or embargo altogether video or audio communications from Iran which aggravate the present crisis, either unilaterally or in compliance with United Nations Security Council sanctions.**

**The First Amendment requires that any action taken to limit communications from Iran be narrowly tailored and sweep no more broadly than the underlying justification requires. A restriction that severs all communications links with Iran would be subject to less exacting First Amendment scrutiny than a more limited restriction based in whole or in part on the contents of the communication.**

December 27, 1979

## MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

You have asked us to provide an overview of the legal issues raised by executive action, either unilaterally or in compliance with United Nations Security Council sanctions, that would have the effect of prohibiting importation of certain types of television messages or transmissions from Iran. Specifically, the action would address video messages that aggravate the hostage situation by creating in the minds of the captors the impression that they have a vehicle for manipulating public opinion in this country. These video messages might include statements by the Ayatollah Khomeini, messages from the student captors, or tapes of mob demonstrations in front of the American Embassy in Tehran. We consider first the President's statutory and constitutional authority to proceed with and without a Security Council resolution. We then outline the First Amendment limits on that authority.

### I. Authority

Article 41 of the United Nations Charter gives the Security Council authority to "decide what measures not involving the use of armed force are to be employed to give effect to its decisions." The range of measures appears to be quite broad, and may "include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." Therefore, Article 41 can be construed to include an international news embargo: a complete or selective restriction of news transmitted—either directly or indirectly—from a particular country. It would at the very least include severance of the means of transmission that link the embargoed country with the outside world, *e.g.*, microwave transmission links.

Under 22 U.S.C. § 287c, the President by executive order may implement a Security Council resolution and, to that end,

> . . . investigate, regulate or prohibit, in whole or in part, economic relations or rail, sea, air, postal, telegraphic, radio, and other means of communication between any foreign country or any national thereof or any person therein and the United States or any person subject to the jurisdiction thereof, or involving any property subject to the jurisdiction of the United States.

We think that this provision does constitute a broad grant of authority by Congress to the President. Subject to First Amendment limitations, it would appear to empower him to prevent importation of video or audio messages from Iran, certain leaders of that nation, or particular citizens within that nation, and thereby prevent their display to the American people via radio and television. Section 287c(b) states that anyone convicted of violating such an executive order would be subject to a fine of not more than $10,000 and imprisonment of not more than 10 years. In the event of violation by a corporation, § 287c provides for the fining and imprisonment of officers, directors, and agents of the corporation and the seizure of corporate property involved in the violation. (There is no injunctive provision in the statute.)

Should the President wish to impose a message embargo unilaterally, *i.e.*, without the benefit of a Security Council resolution, other sources of statutory and constitutional authority are arguably available to him.

1. The International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701–06 (Supp. I 1977), affords the President the authority in a national emergency to

> . . . investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest; by any person, or with respect to any property, subject to the jurisdiction of the United States.

50 U.S.C. § 1702(a)(1)(B). That authority is subject to the significant proviso that it does not include "the authority to regulate or prohibit directly or indirectly any postal, telegraphic, telephonic, or other per-

sonal communication, which does not involve a transfer of anything of value." 50 U.S.C. § 1702(b).

Because of this proviso we think there are some restrictions directed toward communications that are not within the terms of the IEEPA. We think that the Act could properly be invoked to limit the use of Iranian facilities by American networks including the use of broadcasting studios, transmission lines, and local film crews. In short, the economic dimension of news broadcasting could be directly regulated. But it probably does not afford authority to regulate the communications dimension *per se.* On this distinction between economic and noneconomic considerations, two statements in the pertinent House committee report are worth review:

> As a further substantive constraint, the scope of the authorities should be clearly limited to the regulation of international economic transactions. Therefore the bill does not include authorities more appropriately lodged in other legislation, such as authority to regulate purely domestic transactions or to respond to purely domestic circumstances, or authority to control *noneconomic* aspects of international intercourse such as personal communications or humanitarian contributions.

H. Rep. No. 459, 95th Cong., 1st Sess. 10–11 (1977). The report goes on to state:

> [W]hile it should be the purpose of the legislation to authorize tight controls in time of national emergency, these controls should not extend to the total isolation of the people of the United States from the people of any other country. Such isolation is not only unwise from a foreign policy standpoint, but enforcement of such isolation can also entail violation of First Amendment rights of freedom of expression if it includes, for example, prohibitions on exchange of printed matter, or on humanitarian contributions as an expression of religious convictions.

*Id.* at 11.

2. A second, and probably the best, source of statutory authority is 22 U.S.C. § 1732. It provides:

> Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall

> forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.

This provision was passed by Congress in 1868 and has never been utilized. It is striking both in the breadth of the authority it confers and in its apparent textual appropriateness for the present situation. We think that this section can plausibly be read to authorize the President to take all actions—short of acts of war and consistent with specific constitutional prohibitions—necessary to obtain the release of the hostages.

3. The President arguably has statutory authority to prevent the use of COMSAT satellites for the broadcast of inflammatory newsreels from Iran. Section 721 of Title 47 of the United States Code gives the President authority to

> (4) exercise such supervision over relationships of [COMSAT] with foreign governments or entities or with international bodies as may be appropriate to assure that such relationships shall be consistent with the national interest and foreign policy of the United States.

The problem with relying on this section in the proposed fashion is that the President is not attempting to regulate the relationship of COMSAT with a foreign nation, but with American corporations that are attempting to transmit information about that nation. While we have not had time as yet to study the application of this statute, we are unaware of any occasion on which this power has been utilized.

4. Finally, there is an argument that the President has the inherent constitutional authority to take the proposed action on the basis of his plenary role in foreign affairs. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). That is, in the absence of an express limitation on his authority by Congress, the President can take all action necessary to protect American nationals overseas, unless again these actions violate specific constitutional restrictions. Analysis would proceed along the lines of Mr. Justice Jackson's concurrence in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635–38 (1952). An argument similar to the one we have presented to the D.C. Circuit in the Iranian student deportation case could be made. The President's power, we could contend, is at its greatest in this arena because he has considerable and well recognized constitutional powers in the foreign affairs area, and those powers have been augmented by Congress'

delegation to the President of all the power the legislature possesses to respond to acts by foreign powers that deprive Americans of their liberty (i.e., the 1868 untested statute). Even without relying on that particular statutory delegation, we could argue that the President is moving into Mr. Justice Jackson's "zone of twilight" where exigency demands that the constitutional scheme permit prompt executive action, although a similar restriction would be within the legislative power of Congress. It should be noted that a potential response to this argument is that by passing the IEEPA, Congress has defined the express manner by which the President is to impose nonmilitary sanctions on a foreign government.

In considering which "authority" base to assert, it will be important to weigh the fact that under both the U.N. sanction alternative and under IEEPA a criminal sanction is readily available. Absent reliance on ill-fitting espionage laws, there are no criminal sanctions for failures to comply with actions based on the President's constitutional powers or on the 1868 statute.

## II. First Amendment

Regardless whether the President relies on a Security Council resolution or some other basis for the proposed action, he still is bound by First Amendment limitations. It is clear that U.S. treaty obligations are subject to constitutional scrutiny and, specifically, First Amendment scrutiny. *Reid* v. *Covert,* 354 U.S. 1 (1957). The First Amendment protects the rights of Americans to receive information and ideas, including those from abroad. *Kleindienst* v. *Mandel,* 408 U.S. 753, 762–63 (1972).

The nature of First Amendment scrutiny will depend upon the type of restriction imposed by Security Council or independent executive action. The proposed action might simply consist of a ban on certain specified types of television broadcasts. Transmission of the broadcast despite the ban could subject the network to criminal sanctions, but there would be no prior restraint. Alternatively, the President might institute a licensing scheme whereby all broadcasts of a particular class must be cleared by federal authorities before they can be broadcast domestically. This is a classic prior restraint and subject to more exacting scrutiny.

Whether seen as a prior restraint or as a less severe form of action, the government—as a minimum—must put forward a "compelling interest" in order to justify the restriction. Moreover, there must be a close nexus between the proposed restriction and the purported interest, *e.g., Police Department of the City of Chicago* v. *Mosely,* 408 U.S. 92, 95–96 (1972), and the action taken must be narrowly tailored and may sweep no more broadly than the underlying justification requires. The justification in this case might be that the Iranian government's and the captors' ability to gain access to American television prolongs the captivity of the hostages by affording the abductors a stage that they are unwilling to yield, and that if they are denied the organs of publicity, the rationale for holding the hostages will dissipate, resulting in their release.

This characterization of the United States' interest necessarily prompts a subsidiary question. Precisely what communications prolong the crisis? If the proposed restrictions are too narrow, thus permitting effective publication of Iranian grievances in some form, it can be argued that the United States does not have a compelling interest in the restriction actually imposed because it does not materially advance the stated government interest. If, on the other hand, the restriction is stated broadly, such as a ban on all display of film generated in Iran, the restriction will be subject to the argument that it is overbroad, particularly if the print media could continue to use pictures from Iran. Any restriction must have a clearly defined purpose and an intelligible scope in light of that purpose if there is to be any chance of passing judicial scrutiny.

Of course, an even more demanding standard would apply if the action includes a licensing system whereby the Executive would pass on telecasts before they are transmitted to the American public. As the Supreme Court has repeatedly stated, any "system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971). Whatever the justification here, we would have a difficult time demonstrating the sort of direct, immediate and irreparable harm required to withstand this most exacting form of scrutiny. The cases, as confirmed by our experience with the Iranian student demonstrations, do however suggest two guiding considerations: (1) a court is likely to accord substantial deference to the factual assertions and educated, albeit speculative, judgments of the President's foreign affairs experts; and (2) our chances of success may turn significantly on the extent to which we can demonstrate to a court that the action taken is finely tuned and narrow. Indeed, the few cases that are close to being on point suggest that we would improve the likelihood of success if we can claim that the regulation here affects only time, place, or manner and is not designed to stifle the flow of ideas of information.

We note that the communications embargo could take a third form that might raise less troublesome First Amendment problems but which would probably have limited practical effect. That would be a restriction that simply severs all telegraphic, telephonic, postal, communications satellite, and microwave links with Iran. This would not be a content-based measure and would be subject to less exacting First Amendment scrutiny as a result. It could be justified as another step in the effort to isolate Iran politically and economically from the rest of the world. As a practical measure, we do not think, however, such a restriction would prove useful. American networks could continue to gather film in Tehran and transmit it to the United States from facilities outside Iran. It would probably have only a temporary disruptive effect on the ability of the abductors to command international and American forums.

It was this type of incidental restriction on First Amendment communication that this Office addressed in 1977, when at issue was a proposed executive order prohibiting the use or transfer of any funds within the United States for the purpose of maintaining in this country an office or agent of the government of Rhodesia. This order was intended to implement U.N. Resolution 409. Since one effect of the order would be the closing of the Rhodesian Information Office in the United States, it was argued by opponents of the order that the necessary consequence would be to reduce unconstitutionally the flow of ideas in this country. We advised that since the impact on the Information Office was merely incidental to this Government's legitimate interest in joining the U.N. effort to effect the diplomatic and economic isolation of Rhodesia, the order withstood First Amendment scrutiny. It was not an attempt to restrict communication *per se. See, e.g., Veterans and Reservists for Peace in Vietnam* v. *Regional Commissioner,* 459 F.2d 676 (3d Cir.), *cert. denied,* 409 U.S. 933 (1972) (Trading with the Enemy Act restriction on unauthorized dealings in merchandise constitutional although literature within definition of merchandise).

## III. Conclusion

Our thoughts here are necessarily preliminary, and we will continue to consider these issues as well as the more long-range question of the possible effects of any action touching these types of communications. Our assessment at this stage, however, is, first, that an acceptable authority base for action either through the United Nations or unilaterally can be found and that, second, any action we can hypothesize carries with it significant First Amendment problems.

LARRY A. HAMMOND
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*Office of Legal Counsel*

# Possible Participation by the United States in *Islamic Republic of Iran* v. *Pahlavi*

**As long as the government of Iran is recognized by the United States, it is entitled to maintain a lawsuit in any state or federal court; however, there is a substantial argument that the Iranian government's suit against the Shah to recover allegedly misappropriated governmental funds should be stayed or dismissed without prejudice in light of Iran's massive breaches of its treaty obligations to the United States and international law.**

**The courts have recognized the appropriateness of deferring to the Executive's foreign policy determinations in connection with claims or defenses based on doctrines of foreign sovereign immunity or act of state.**

**The Government's concerns over the effect of the litigation on our foreign policy provide a sufficient basis to support its standing to intervene in Iran's suit against the Shah, and there is precedent to support its intervention and assertion of cross-claims unrelated to the controversy in suit.**

**A respectable argument can be made that the Shah enjoys sovereign immunity from suit, under the 1976 Foreign Sovereign Immunities Act as well as customary international law, and the actions complained of appear to be acts of state. However, the present government of Iran may be able to waive the application of either of these doctrines to defeat its claims against the Shah, since both exist for the benefit of the state in question and not for the individuals who lead it.**

**January 2, 1980**

## MEMORANDUM OPINION FOR THE ACTING ASSOCIATE ATTORNEY GENERAL

This memorandum responds to your questions concerning the possible role of the United States in the recently filed suit of the Iranian government against the Shah in the Supreme Court of the State of New York. (*Islamic Republic of Iran* v. *Pahlavi*, No. 79-22013, Nov. 28, 1979.) The suit advances several causes of action concerning alleged misappropriations of Iranian governmental funds by the Shah, and claims $56 billion in damages against him and his wife. This memorandum, which has been prepared in cooperation with the Civil Division and the U.S. Attorney's Office in New York, analyzes two major options for the United States in participating in the case. First, we might ask for the suit's stay or dismissal until the hostages are released, disclaiming any intent to intimate a position on the merits. The difference between a stay and a dismissal in this situation would be that since the Shah has departed the United States, a dismissal would terminate the court's personal jurisdiction over him, leaving Iran with only *in rem* actions for his assets located here.[1] Second, we could intervene and cross-claim for relief, conceivably even relief unrelated to Iran's claims against the Shah. This memorandum also forecasts the ultimate result on the merits of Iran's claims against the Shah.

Our conclusions are these. First, as a government currently recognized by the United States, Iran is entitled to maintain a lawsuit in any state or federal court of competent jurisdiction. Second, the United States has a sufficient interest to support its standing to participate in some fashion. Third, we have a substantial argument that the New York state court should defer to a request by the Executive Branch to withhold itself from the merits, at least temporarily. Fourth, there is a respectable argument that we may intervene and bring unrelated cross-claims against Iran. Fifth, if the suit survives these initial procedural hurdles, there is a strong prospect that either sovereign immunity or act of state [2] doctrines will bar recovery against the Shah.

### I. Iran's Right to Sue

As a preliminary matter, it seems clear that if the United States were to withdraw diplomatic recognition from the government of Iran, the suit would be dismissed. *See Guaranty Trust Co.* v. *United States*, 304 U.S. 126 (1938). In *Guaranty Trust*, the Court observed that a foreign government may not maintain a suit in our courts before its recognition by the President. It cited a number of federal and state cases dismissing actions by the Soviet government before its recognition, among them a New York state court case, *Russian Socialist Federated Soviet Republic* v. *Cibrario*, 235 N.Y. 255, 139 N.E. 259 (1923). Although withdrawal of recognition would have the effect of voiding the suit against the Shah, as we discuss below it does not seem a necessary expedient to that end. Moreover, derecognition could have the collateral disadvantage of imperiling our present treaties with Iran, upon whose force we rely to assert the illegality of the conduct of its government.[3] The Legal Adviser's Office at the State Department has advised us that there is presently no serious contemplation of terminating recognition of Iran. There is, however, a range of unfriendly actions that this government might take, including severing diplomatic relations. In other cases, such as our longstanding dispute with Cuba, we have eschewed derecognition in favor of less drastic alternatives.

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[1] The U.S. Attorney's Office in New York informs us that service of process in the suit was probably effective. New York law allows any service appropriate to meet the constitutional minimum of notice and an opportunity to appear. After failing to serve the Shah personally, the plaintiffs obtained an order allowing service on the hospital administrator, during the Shah's stay there.

[2] The "act of state" doctrine provides that a court may not review the validity of actions taken by a foreign sovereign within the sovereign's territory. *See generally, e.g.*, L. Henkin, Foreign Affairs and the Constitution 59–64, 216–21 (1972).

[3] It should be noted, however, that our recent withdrawal of recognition of the Republic of China (ROC) was accompanied by a presidential assertion that it would not have the effect of terminating existing treaties with the ROC. *See* the President's Memorandum for All Departments and Agencies of December 30, 1978.

While recognition continues the courts retain jurisdiction, even in a climate of marked hostility. This is made clear by *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964), in which the Court held that the act of state doctrine required American courts to recognize Castro's title to American sugar which he had expropriated, even though the act was in violation of international law. In *Sabbatino,* the Court responded to an argument that the National Bank of Cuba, an instrumentality of the Cuban government, should be denied access to the American courts because "Cuba is an unfriendly power and does not permit nationals of this country to obtain relief in its courts." The Court thought that the issue was one of national policy transcending the interests of the parties to the action, and observed that under principles of comity governing our relations with other nations, sovereign states are allowed to sue in our courts whenever they are recognized. The Court was unresponsive to arguments based on the severance of diplomatic relations, commercial embargo, and freezing of Cuban assets in this country:

> This Court would hardly be competent to undertake assessments of varying degrees of friendliness or its absence, and, lacking some definite touchstone for determination, we are constrained to consider any relationship, short of war, with a recognized sovereign power as embracing the privilege of resorting to United States courts.

376 U.S. at 410. The Court then remarked that its view was "buttressed by the circumstance that none of the acts of our Government have been aimed at closing the courts of this country to Cuba, and more particularly by the fact that the government has come to the support of Cuba's act of state claim in this very litigation." The effect on a court's jurisdiction if the Government takes the opposite position is considered below.

## II. Stay or Dismissal of the Proceedings

The essence of our substantive argument for a stay or dismissal without prejudice would be that Iran's massive breaches of both its treaty obligations to us and international law require appropriate reprisals to force return of the hostages and reparations. We would urge the court that temporarily withholding the aid of American courts to the Iranian government in its affirmative claims against the Shah and his assets would be a fair reprisal for the holding of the hostages. In support of our submission to the court, we could cite analogous precedent for judicial deference to executive formulations of foreign policy in sovereign immunity and act of state cases.

The substance of our claim would resemble our recent presentation to the World Court. We could begin by referring to Iran's treaty obligations to us under the Vienna Convention on Diplomatic and Consular Relations; the Treaty of Amity with Iran; and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons. We could then summarize the facts, indicating breaches of a number of the provisions of these treaties. We could then point out that these treaties and surrounding principles of customary international law (which include doctrines of reprisal) have been incorporated as part of our domestic law. Article VI of the Constitution makes treaties part of the supreme law of the land, along with the Constitution and statutes. The Vienna Convention on Diplomatic Relations includes an affirmation in its preamble that rules of customary law should govern questions not expressly regulated by the terms of the Convention. And the Supreme Court has recognized customary international law as part of our domestic law.[4]

Customary international law allows reprisals, which are breaches of a treaty's terms or other unfriendly conduct in response to a breach by another party. Reprisals must, however, respond in a proportionate manner to the preceding illegal act by the party against whom they are taken. *See* G. Schwarzenberger, A Manual of International Law 184 (5th ed. 1967). The proportionality of a reprisal in a particular case is a matter largely committed to judgment and precedent.

The Iranian breaches in this case are massive and largely unprecedented; reprisals even more severe than asset freezing and a temporary closing of forum doors would probably be appropriate, for example total embargoes and blockades. Nevertheless, the Iranians could urge that a denial of access to the courts is a particularly serious matter under the U.S. Constitution, and that the Supreme Court has refused to allow the closing of the courts even during the domestic insurrection of the Civil War. (*See Ex Parte Milligan,* 71 U.S. (4 Wall.) 2 (1866)). Numerous rejoinders suggest themselves. First, we could emphasize that we are urging only a temporary denial of access to our courts while the hostages are held, and that we would not seek to interfere with the prosecution of a suit after their release. (Because the Shah has left the country, however, dismissal would leave Iran with only *in rem* claims against his assets. In that sense, even dismissal without prejudice would permanently close our forum to some of Iran's claims.) Second, we could point out that Iran has refused to follow the World Court's order to release the hostages, or otherwise to obey the dictates of international law that they be freed. The "unclean hands" analogy is obvious. Third, *Sabbatino* implies that a Government request to close the courts could be an appropriate response to a foreign nation's denials of redress—that an executive branch request could provide the "definite touchstone for determination" that standing should be denied. And fourth, foreign nations do not have any claim to seek the aid of our courts without the interference of our executive branch.[5] For when they are unrecognized they may not sue at all; when they are allowed to sue, the Government may affect the outcome on the merits by interposing or withdrawing the defenses of sovereign immunity and act of state, as we discuss in more detail below.

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[4] In *The Paquete Habana,* 175 U.S. 677, 700 (1900), the Supreme Court held that under international law, fishing vessels belonging to enemy nationals were exempt from capture and condemnation by American vessels:

> International law is part of our law, and it must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.

The *Cibrario* case, cited *supra,* is one example of the New York Court of Appeals' application of principles of international law in conformity with this principle.

## III. Judicial Deference to Executive Branch Formulations of Foreign Policy

This brings us to the question of the respective roles of the federal executive and a state court in deciding whether Iran shall be allowed to maintain this lawsuit. Here there is a long history of deference by courts to executive foreign policy determinations regarding foreign claims or defenses that are affected by doctrines of immunity or act of state. Since these two doctrines affect the outcome of a case on the merits, it seems likely that a court would treat a request for a temporary stay or dismissal that is based on foreign policy according to the same principles.

In *Ex Parte Republic of Peru,* 318 U.S. 578, 589 (1943), the State Department had "recognized and allowed" the immunity of a merchant vessel owned and operated by the Peruvian government. Accordingly, the Court held that an *in rem* action against the vessel should be dismissed. The Court said:

> The [Department of State] certification and the request that the vessel be declared immune must be accepted by the courts as a conclusive determination by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign relations.[6]

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[5] Chief Judge Kaufman of the Second Circuit Court of Appeals remanded the case of *Electronic Data Systems* v. *Iran* on November 29, 1979, in part for the following determination:

> On remand the district court may ascertain the position of the Department of State concerning the defendant's right of access to United States courts under the extraordinary circumstances now prevailing.

610 F.2d 94, 95 (2d Cir. 1979).

[6] Two years later, in *Republic of Mexico* v. *Hoffman,* 324 U.S. 30, 36, 38 (1945), the Court elaborated further:

> But recognition by the courts of an immunity upon principles which the political department of government has not sanctioned may be equally embarrassing to it in securing the protection of our national interests and their recognition by other nations.

* * * * *

Continued

The Second Circuit Court of Appeals then decided cases in much the same vein. *See Bernstein* v. *Van Heyghen Freres,* 163 F.2d 246 (2d Cir. 1947), *cert. denied,* 332 U.S. 772 (1947); *Bernstein* v. *N.V. Nederlandsche-Amerikaansche,* 173 F.2d 71 (2d Cir. 1949). In the latter, after the court had applied the act of state doctrine to bar review of Nazi expropriations, the State Department wrote a letter to the court saying:

> The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property . . . lost through . . . duress as a result of Nazi prosecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.

The court of appeals responded by holding that the doctrine would not apply in view of this supervening expression of executive policy, and revised its mandate. *Bernstein* v. *N.V. Nederlandsche-Amerikaansche,* 210 F.2d 375, 376 (2d Cir. 1954).

Before the Supreme Court suggested that courts should defer completely to executive discretion regarding the need to apply sovereign immunity doctrine in a particular case, the New York Court of Appeals had taken a position that retained a more active judicial role. In *Anderson* v. *N.V. Transandine Handelmaatschappij,* 289 N.Y. 9, 43 N.E.2d 502 (1942), a New York resident sued a Netherlands firm for converting securities and monies owned by his assignor, on a cause of action arising in the Netherlands. The defendants answered that a decree of the lawful government of the Netherlands had vested title to the property in the government. The question was therefore the effectiveness of the decree. The State Department, through the U.S. Attorney, applied to the court of appeals for leave to appear and file "A Suggestion of the Interest of the United States in the Matter in Litigation." [7] The Suggestion of Interest began by identifying the interest of the United States in the subject matter as the effect of the court's decision on the foreign policy of the United States. The Government outlined the applicable policy and urged the court to affirm the decision below, dismissing the suit.

To the court of appeals, the question was whether the action of the Netherlands offended New York public policy.[8] The confiscation

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> We can only conclude that it is the national policy not to extend the immunity in the manner now suggested, and that it is the duty of the courts, in a matter so intimately associated with our foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent which the government, although often asked, has not seen fit to recognize.

[7] The U.S. Attorney stated in his application that "in the interest of orderly procedure" the matter was being presented by motion for leave to file, though he questioned whether leave of the court was necessary. 43 N.E.2d at 505.

[8] The court summarized its view of the law: "By comity of nations, rights based upon the law of a foreign State to intangible property which has a situs in this State, are recognized and enforced by the courts of this State, unless such enforcement would offend the public policy of this State." 43 N.E.2d at 506.

involved, having occurred during the emergency of World War II, did not offend the sensibilities of the court. Having decided the issue, the court continued in dictum that it need not consider whether the State Department's formulation of policy could change judicial questions determined in the New York system into political questions which would allow the Department of State to supersede the public policy of the state. The court recognized there might be situations in which that power should exist, for example where the public policy of a State would interfere with the performance of an executive agreement (such as the assignment of Russian claims to the United States that was upheld in *United States* v. *Pink*, 315 U.S. 203 (1942)). The court thought that allowing State Department policy formulation to override the public policy of a state might involve "very serious consequences" in some cases, but could have no untoward consequences where, as here, the State Department and the state were in agreement.

In its reservation concerning the conclusive effect of the State Department's formulation of policy, the New York Court of Appeals foreshadowed developments to come in the formulation of the relevant doctrines. In *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), the Supreme Court placed the act of state doctrine on a new footing somewhat less deferential to Executive Branch formulations than the old immunity cases. In *Sabbatino* the Court's recognition of Castro's title to the American sugar accorded with the request of the Executive Branch. Nevertheless, the Court went out of its way to reformulate the doctrine as law created by the federal courts on their own authority, not as a direct reflection of national policy as promulgated by the Executive. The Court said:

> The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere. . . . Whatever considerations are thought to predominate, it is plain that the problems involved are uniquely federal in nature. If federal authority, in this instance this Court, orders the field of judicial competence in this area for the federal courts, and the state courts are left free to formulate their own rules, the purposes behind the doctrine could be as effectively undermined as if there had been no federal pronouncement on the subject. . . . [W]e are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships

> with other members of the international community must
> be treated exclusively as an aspect of federal law. . . .

376 U.S. at 423–25. Thus, the decision made act of state a component of federal common law, and expressly said that this was one of those "enclaves of federal judge-made law which bind the States." At the same time, the Court realized that New York law also accepted the doctrine, and would have reached the same result. *Id.* at 426.

In *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759 (1972), the Cuban government sued to recover assets held by the bank; the bank counterclaimed for the value of its properties which Cuba had confiscated. In the lower courts, the Department of State communicated a "determination by the Department of State that the act of state doctrine should not be applied to bar the counterclaim." The Court of Appeals disregarded the Department and applied the doctrine to dismiss the counterclaim. The Supreme Court reversed, but only a plurality of three Justices thought that the Court should give conclusive effect to State Department policy; six Justices explicitly rejected the doctrine that the courts are bound to follow the Executive in such cases.

Thus, the Supreme Court's two recent cases on act of state suggest that the earlier immunity cases, which were not strictly in point and were not mentioned, were somewhat overstated. Nevertheless, all of the cases have recognized the appropriateness of Executive Branch communications to the courts expressing foreign policy concerns over application of the defense doctrines in particular lawsuits.

If the Executive may urge the courts to reach a particular outcome on the merits, surely it may urge a temporary stay or dismissal for the same kinds of reasons. At the same time, it is now difficult to argue that executive determinations are conclusively binding on the courts, even in contexts related to but not subsumed within the act of state doctrine. The courts will not promise to accede to State Department policy views; by the same token, deference is likely to occur in true crisis situations such as the present one, where the Department of State can give good reasons, grounded in the complexity of foreign policy, for urging a particular disposition. Thus, *Sabbatino*'s discussion of closing the forum to foreign governments suggests that a State Department request to deny standing might have received deference in that case, and should receive deference in this one.

In making its decision on a stay or dismissal motion in Iran's suit against the Shah, the New York court could draw on either of two sources of law. One would be the federal common law principles of the two recent Supreme Court cases, to the extent that they now govern beyond the act of state context. Here an argument can be made that the functional considerations the Court advanced should make federal common law govern whenever foreign policy concerns have direct impact on domestic litigation, and that the Court's deference to Executive Branch submissions should apply as well. Alternatively, we could invoke the state law public policy doctrine of *Anderson, supra,* to the extent it survives *Sabbatino.* We have not researched the New York public policy cases, but an argument to basic equity principles such as "unclean hands" seems one possibility.

## IV. Cross-claims

Instead of seeking to delay or dismiss the suit, we could attempt to intervene in the lawsuit as a party, seeking affirmative relief. Intervention as a party might allow us to assert a cross-claim against the plaintiff "Islamic Republic" under the doctrine of *Republic of China* v. *First National City Bank,* 348 U.S. 356 (1955). In allowing a party sued by an otherwise immune sovereign to assert any claim of its own against that sovereign, *Republic of China* emphasized considerations of "fair dealing." Thus, Iran has waived its immunity from suit to at least some extent by invoking the aid of our courts. *Republic of China* held explicitly that a counterclaim need *not* be related to the subject matter of the plaintiff's claim. The case does not provide direct precedent, however, for third party intervention to assert claims, some of which might bear no relation to the controversy in suit. Nevertheless, the emphasis on "fair dealing" in *Republic of China* suggests that the Government might have a special argument that Iran's use of our courts to pursue its case against the Shah should subject Iran to all claims the United States may have against it. Such an argument would derive from the Government's power to deny Iran a forum entirely (by withdrawing recognition) or partially (by urging the courts to allow the interposition of defenses). Therefore, by bringing a lawsuit that depends for its success on cooperation by our Government, Iran may open itself to our own claims against it. Perhaps, however, our rights in the matter would be limited to any of the Shah's assets the court may decide to be those of Iran.

## V. The Interest of the United States in this Litigation

In order to participate in Iran's suit against the Shah, the Government must demonstrate a sufficient interest in the litigation to support its standing. The nature of the interest asserted would depend on the nature of the Government's position. If we decide to ask for stay or dismissal of the case, our concerns about the effect of the litigation on our foreign policy would provide a sufficient interest. That is implicit in the numerous cases receiving government communications on the sovereign immunity and act of state doctrines. Also, at least some support could be drawn from cases recognizing the Government's standing to sue to enforce its treaties (*e.g., Sanitary District* v. *United States,* 266

U.S. 405 (1925)). Here we would be seeking to enforce a treaty reprisal through the judicial process.

On the other hand, if we seek to intervene and cross-claim ordinary standards for intervention in New York would probably apply. These are discussed below.

## VI. The Government's Strategy Choices

The Government might eventually take any of a number of policy positions with regard to this lawsuit. Therefore, it is important to avoid a hasty submission to the court that might foreclose later options. There are at least the following possibilities:

1) Request for a temporary stay.
2) Request for dismissal without prejudice.
3) A request that the court honor the Shah's sovereign immunity and act of state defenses.
4) A request that the court disregard the Shah's defenses.
5) Intervention with a cross-claim against Iran.
6) Our substitution as plaintiff for Iran pursuant to an assignment of its claims against the Shah. (This presently seems remote, but it has occurred in the past. *E.g., United States* v. *Pink,* 315 U.S. 203 (1942).)
7) Expansion of the current freeze to include the assets of the Shah or all Iranian nationals. This could be accomplished without communicating with the court, but with indirect effect on the litigation.

First, a temporary stay could be sought without foreclosing our other options. Since the court is likely to be expecting a communication from us on the applicability of the defense doctrines, we could and should be explicit that our stay request intimates no position on the merits. A request for dismissal without prejudice, however, could lead to the foreclosure of our opportunity to counterclaim, if the request is granted and Iran does not file an *in rem* action.

Submissions to the court regarding the defense doctrines are not fully consistent with a cross-claim. For if the Government were to intervene, claiming the assets insofar as they are adjudged to belong to Iran, we would be in no position to file suggestions that immunities or act of state should be waived to our pecuniary benefit. Perhaps, however, the situation would be different were we asking for a general judgment against Iran, without regard to the ownership of these assets.

An early submission suggesting that the defense doctrines be applied in the Shah's favor might prevent the Government from taking a later assignment of Iran's claim. It therefore seems best to avoid taking any position on the applicability of the defenses for the time being.

An expansion of the freeze to include these assets does not seem inconsistent with any of the possible actions to be taken in the litigation. It should not be necessary to take a position on the ultimate ownership of the Shah's assets in order to freeze them as property in which Iran or an Iranian national has an interest.

## VII. Modes of Participating in the Lawsuit

The precedents cited above indicate a number of alternative means by which the Government's position can be communicated to the court:

### *A. Letter*

A letter can be written to the Administrative Judge, First Judicial District, Supreme Court of the State of New York. (Under New York procedure, this case will not be assigned to an individual Justice until it requires some form of judicial action, as when a party files a motion requiring adjudication.)

### *B. Suggestion of Interest*

A "Suggestion of Interest of the United States" can be filed, as was done in *Anderson, supra. See also Federal Republic of Germany* v. *Elicofon,* 358 F. Supp. 747 (E.D.N.Y. 1972), *affirmed on opinions below,* 478 F.2d 231 (2d Cir. 1973) (expressing the Government's nonrecognition of East Germany and recognition of West Germany).

### *C. Amicus Curiae*

New York law neither forbids nor generally defines *amicus curiae* submissions, except for the Court of Appeals, which specifically permits them under general criteria which this case would satisfy. New York Court Rules § 500.9(e) (1978). The *amicus* vehicle is, however, frequently employed in both the Supreme Court and the Appellate Division by means of a motion on notice for permission to file. It is recognized indirectly, *e.g.* N.Y. Civ. Prac. Law § 1012(c) (McKinney 1980), and in all likelihood would not be rejected. Of course, our appearance *amicus* would not accord the Government the right to appeal.

### *D. Intervention*

The Government could intervene as of right, N.Y. Civ. Prac. Law § 1012, or by permission, § 1013. Intervention must be "timely." We have found no cases of intervention by the United States in New York courts under the modern rules, and no discussions of early intervention. Understandably, the cases have focused on tardy intervention, and have allowed it as late as the eve of trial or even post-judgment, unless intervention would delay the case unnecessarily or confuse the issues.

*See Stanford Associates* v. *Board of Assessors,* 39 A.D.2d 800, 332 N.Y.S.2d 286 (3d Dep't 1972); *Auerbach* v. *Bennett,* 64 A.D.2d 98, 408 N.Y.S.2d (2d Dep't 1978).

The standards for intervention as of right are as follows:

> Upon timely motion, any person shall be permitted to intervene in any action:
>
> 1) when a statute of the state confers an absolute right to intervene; or
> 2) when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment; or
> 3) when the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment.

N.Y. Civ. Prac. Law § 1012(a).

To intervene as of right the Government can argue that it may be "bound" by the judgment due to its effects on foreign policy; we can notify the court that we may make a submission later concerning whether immunity or act of state doctrines should bar the claim. Alternatively, we could argue that this action involves the disposition of property, *i.e.* the Pahlavi Foundation building in New York and any other such assets, and that the United States would be affected by a judgment in that we might claim the assets ourselves, if held to belong to Iran. There appears to be no precedent in New York law for arguments not based on our own claims to these assets (indeed, the New York courts have interpreted this provision largely in terms of commercial interests, *see Cavages, Inc.* v. *Ketter,* 56 A.D.2d 730, 392 N.Y.S.2d 755 (4th Dep't 1977)). Still, it is difficult to imagine that intervention in some form will not be allowed in view of the circumstances. Moreover, New York's rules were adapted from the federal rules, and were meant to broaden their scope and to liberalize them. *See* 12 N.Y. Jud. Council Rep., 163, 218–32 (1946); *see also* 2 Weinstein, Korn & Miller, New York Civil Practice 1012.04 (1978). Thus, in view of New York's general inclination to take guidance from the Federal Rules of Civil Procedure, and the liberal interpretation given Rule 24, Fed. R. Civ. P. and its predecessors, intervention as of right might have a good chance of success. *See, e.g., SEC* v. *U.S. Realty,* 310 U.S. 434 (1940) (permitting the SEC to intervene to protect the integrity of its regulatory framework).

If at this point in the litigation the Government decides to make arguments for stay or dismissal that are essentially unrelated to the property involved in the lawsuit, it may be more politic to invoke the liberal standard for permissive intervention,[9] although New York appears to make little distinction between the two standards. We could identify common questions of law or fact as those bearing on any submission to be made in the litigation concerning immunities or act of state doctrine. . . .

## VIII. Iran's Prospects on the Merits

The complaint alleges that the Shah was the *de facto* ruler and head of state of Iran from 1941 until January 1979. The acts complained of are alleged to have taken place in Iran during the period that the Shah was the ruling monarch. The complaint is devoid of allegations that the Shah engaged in any of the acts complained of in the territory of the United States or at a time subsequent to January 1979 when he presumably ceased to be the head of state of Iran.[10] Based on these allegations, the acts alleged appear to constitute acts of state.

A respectable argument can also be made that the Shah enjoys sovereign immunity from suit.[11] Restatement (Second) of the Foreign Relations Law of the United States, § 66 (1965), states in pertinent part:

> § 66. Applicability of Immunity of Foreign State
>
> The immunity of a foreign state under the rule stated in § 65 extends to
>
> (a) the state itself;
>
> (b) its head of state and any person designated by him as a member of his official party;
>
> (c) its government or any governmental agency; . . .

The 1976 Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.*, does not expressly address the privileges and immunities of reigning monarchs, but talks only in terms of "foreign states." Nevertheless, under the Restatement formulation, *supra*, it is arguable that a reigning monarch enjoys the immunities of a "foreign state" as codified in the Act.

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[9] To intervene by permission:

> Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.

N.Y. Civ. Prac. Law § 1013.

[10] It is not clear whether the Shah did, in fact, cease to be head of state of Iran after he left Iran in January 1979. The Shah himself has never abdicated; the United States government has never pronounced that it no longer recognizes the Shah as the reigning monarch of Iran.

Although it is manifest that the Shah no longer exercises *de facto* governmental powers, it is not unusual in international law to treat fictions as realities. Thus, the United States recognized as the *de jure* government of Russia from 1917 until 1933 the Kerensky government, even though Mr. Kerensky had fled the Soviet Union in 1921.

[11] In *Hatch* v. *Baez*, 14 N.Y. (7 Hun) 596 (1876), the court held that the acts while in office of a former head of state were immune from judicial scrutiny. The court's decision is phrased in terms suggestive of both act of state and sovereign immunity doctrines.

Section 1605(a)(5) preserves the immunity of foreign states from suit with respect to—

> (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
>
> (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

The tortious and wrongful acts alleged in the complaint would probably fall within the above exceptions of the Act.

Alternatively, if the Act were construed not to apply to personal monarchs, the Shah would be entitled to immunity under generally recognized doctrines of customary international law. *See* 1 Oppenheim's International Law 676 ff. (Lauterpacht ed., 7th ed. 1953).

Since either act of state or sovereign immunity may defeat Iran's claims against the Shah if applied in this case, it is important to consider whether the present Iranian government may waive the application of these doctrines to the acts of its predecessor. There appears to be a paucity of authority on point. As an *a priori* matter, it seems that Iran might be able to waive the doctrines, at least if our submission to the court urges allowing them to do so.[12] Both doctrines exist for the benefit of the state in question, not for the individuals who lead it. Therefore it seems incongruous to apply the doctrines to defeat a claim by a state for its own assets converted by a former monarch.

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*Office of Legal Counsel*

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[12] Analogy may be taken to the pattern of diplomatic immunities and then waiver. Under the Vienna Convention on Diplomatic Relations, the sending state may waive a diplomat's immunity (art. 32). Absent waiver, however, immunity for the exercise of official functions subsists after the diplomat's appointment has terminated (art. 39.2).

# Presidential Power Concerning Diplomatic Agents and Staff of the Iranian Mission

While there is authority for imposing some travel restrictions on Iranian diplomatic personnel under the Vienna Convention on Diplomatic Relations and customary international law, as well as under domestic law, those sources of law generally state that diplomats may not be placed in circumstances tantamount to house arrest, or barred from leaving the country, even as an act of reprisal for breaches of diplomatic immunity by Iran.

Subjecting Iranian diplomatic personnel to prosecution under the criminal provisions of the International Emergency Economic Powers Act, even if done in reprisal for Iranian breaches of international law and accompanied by all applicable protections afforded by the United States Constitution, would raise serious questions under international law.

January 8, 1980

## MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

On November 14, 1979, you asked this Office to review certain questions relating to the situation in Iran, and during the last few weeks we have provided you our views on a number of these questions orally. In this memorandum we summarize the central legal issues involved in taking actions against Iranian diplomatic personnel in this country, and set forth our reasoning and conclusions. We address, principally, the following questions:

1) May the President restrict the movement of Iranian diplomatic agents and staff personnel within the United States, including, if necessary, confinement to embassy grounds;
2) May he prevent these persons from departing the country;
3) May he subject these persons to prosecution for violations of the International Emergency Economic Powers Act, 50 U.S.C. § 1705?

We conclude that although the President may possess constitutional and statutory power to take any or all of these actions, each of them raises serious international law questions.

### I. Restricting the Movement of Members of the Iranian Mission

*A. International Law*

The rights of diplomatic personnel are governed by the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, ratified by Iran, the United States, and all major countries of the world. Any doubts that may have existed concerning whether the Treaty automatically became part of our domestic law upon its ratification have been removed by the recent passage of the Diplomatic Relations Act, 22 U.S.C. §§254a–256, a major purpose of which was to codify the Convention's immunity provisions as part of our law. *See generally* S. Rep. No. 958, 95th Cong., 2d Sess. (1978).

As an introductory matter, the Convention and the Act establish categories of diplomatic personnel, and grant them varying degrees of immunity. Under Articles 1, 31, and 37 of the Convention and 22 U.S.C. §§254a and 254d, diplomatic agents and their families enjoy complete criminal immunity and nearly complete civil immunity. Members of the administrative and technical staff and their families enjoy complete criminal immunity and civil immunity for acts in the course of their duties. Service staff of the mission enjoy immunity for acts performed in the course of their duties. The Act implements these immunities by providing that actions brought against individuals who are entitled to immunity in respect to them under the Convention or the Act shall be dismissed (§254d).

The Convention has a number of substantive provisions that are relevant here. First, Article 22 provides unconditionally that the premises of the mission shall be inviolable, and places a special duty on the receiving state to protect the premises against intrusion and to refrain from searching it. Iran is clearly in massive breach of this Article.[1]

Article 26 requires the receiving state to guarantee members of the mission[2] freedom of movement in the country, subject to regulations establishing national security zones. This Article was adopted against a background of longstanding travel restrictions imposed by nations on a reciprocal basis. (For example, after World War II the Soviet Union limited travel by members of diplomatic missions in Moscow to 50 kilometers from the capital, absent special permission. The United States and others retaliated by imposing reciprocal restrictions on the Soviet Union and other offending nations.) An amendment to the Article that would have stated that prohibited zones must not be so extensive as to render freedom of movement illusory failed of passage. This does not constitute an affirmative endorsement of highly restrictive travel zones, however, since a statement to the same effect as the failed amendment was already in the commentary to the Article. At any rate, travel restrictions have continued on a more or less restrictive basis since adoption of the Convention. *See generally* E. Denza, Diplomatic

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[1] The United States could confine members of the Iranian Mission to the premises without violating this Article, although such an action could violate Article 29's prohibition of arrest.

[2] Under 22 U.S.C. §254a, the term "members of a mission" includes diplomatic agents, administrative and technical staff, and service staff, as defined in Article 1 of the Convention.

Law, Commentary on the Vienna Convention on Diplomatic Relations, 115–18 (1976).

Our own legislative history of the Convention suggests that "protective custody" of diplomatic personnel could be justified under Articles 26 and 29. The State Department's Legal Adviser testified before the Senate Foreign Relations Committee that these provisions could be used in situations involving armed conflict to justify placing diplomats in protective custody. He pointed out that while Article 29 prohibits arrest, it also provides that the receiving state shall take appropriate steps to prevent attacks on a diplomat's person. 7 M. Whiteman, Digest of Int'l Law 442 (1970).

This argument, however, is subject to two rejoinders. First, reconciling Article 26, allowing travel restrictions, with Article 29, forbidding arrest, requires a legal and practical distinction at some point between travel restrictions and arrest. The practice of travel restrictions against which the Convention was drafted had never reached the level of house arrest. Second, in the Convention the United States opposed a provision now found in Article 39.2, stating that immunities such as those against arrest continue even in case of war. We argued that it was necessary to intern enemy diplomats at the outbreak of war, citing the World War II experience. We proposed an amendment that failed, which would have allowed the receiving state in time of national emergency, civil strife, or armed conflict to institute appropriate measures of control of mission personnel and their property, including protective custody to insure their safety. *See* 7 M. Whiteman, *supra*, at 441. The history of the failed American amendment is ambiguous enough that it does not necessarily preclude limited imposition of protective custody relying directly on the duty in Article 29 to "take all appropriate steps to prevent any attack on" a diplomat's person, but a protective custody theory would be very hard to reconcile with an accompanying ban on departure from the country. Indeed, Article 44 provides that even in case of armed conflict, the receiving state must allow mission personnel an opportunity to leave the country at the earliest possible moment. In short, house arrest of mission personnel accompanied by a ban on their return to Iran cannot fairly be argued to be within the substantive terms of the Convention.

Article 47 of the Convention provides that a state may discriminate against another state by applying any of the provisions of the Convention restrictively "because of a restrictive application of that provision to its Mission in the sending state." The background to this provision indicates that it authorizes reciprocally unfavorable treatment only to an extent that is not clearly contrary to the terms of the Convention. Denza, *supra*, at 283–84. This means that relatively restrictive travel zones imposed by another country would allow us to impose restrictive travel zones on a reciprocal basis, but would not justify our breach of the Convention, for example by invading their mission.

The Convention's preamble affirms "that the rules of customary international law should continue to govern questions not expressly regulated" by its provisions. Customary international law allows reprisals, which are breaches of a treaty's terms in response to a breach by another party. To be legal, reprisals must respond in a proportionate manner to a preceding illegal act by the party against whom they are taken. *See* G. Schwarzenberger, A Manual of International Law 184 (5th ed. 1967).[3] Identical reprisals are the easiest to justify as proportionate, because subjective comparisons are not involved. Thus, in the current crisis, the taking of Iranian diplomats as "hostages" (or a lesser restriction on their freedom of movement that approaches imprisonment) would clearly be a proportionate response; reducing the immunity of Iranian diplomats from criminal prosecution would be more difficult to justify.

At this point a special difficulty arises. International law scholars have identified an exception to the law of reprisals: "diplomatic envoys may not be made the object of reprisals, although this has occasionally been done in practice." H. Lauterpacht, 2 Oppenheim's International Law 140 (7th ed. 1952), citing Grotius. Customary international law often has no firmer basis than the opinions of the scholars, bolstered by their own reputations and the precedent they can summon. This exception to the reprisals doctrine can claim the support of some highly reputable scholars.

It is unclear whether this exception is meant to refer only to the illegality of taking reprisals against diplomats in response to unrelated breaches by the sending state (e.g., a blockade), or whether it is meant to extend to a ban on reprisals against diplomats even when the sending state commits a breach of diplomatic immunity. The former interpretation has the evident merit of preventing routine harassment of diplomats, and would leave a role for reprisals in such extreme circumstances as the present Iranian actions.

Nevertheless, the exception is stated in terms suggesting that reprisals against diplomats are never legal. As a result, if the United States were to take action amounting to a breach of the Vienna Convention, such as arresting Iranian diplomats or barring their departure from the country, a reputable argument could be made that our action was illegal, despite major previous breaches by the other side. Here it can be argued that Article 47 of the Vienna Convention means to forbid full-scale reprisals against diplomats, no matter the provocation. It would be pointed out that economic reprisals (blocking assets, boycotts, or even blockade) stand as substitute remedies.

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[3] This principle is also codified in the Vienna Convention on the Law of Treaties, Article 60, Senate Exec. L., 92d Cong., 1st Sess. (1971), which allows suspending the operation of a treaty in whole or in part upon the material breach of another party, but which is not yet in force and has not been ratified by the United States.

There may be added support for the view that reprisals against diplomats are never legal in the World Court's recent order granting an "indication of Provisional Measures" in *United States of America* v. *Iran*. For the Court ordered release of the hostages, including diplomatic personnel, despite Iran's argument that the hostage-taking should be viewed as "secondary" to "25 years of continual interference by the United States in the internal affairs of Iran, . . . and numerous crimes perpetrated against the Iranian people, contrary to . . . all international and humanitarian norms." The seriousness of these allegations did not convince the Court that imprisoning diplomats was a fit reprisal. Still, the Iranian action was not presented as a reprisal for breaches of diplomatic immunity, and the Court did not speak to that issue. It ordered release "in accordance with the treaties in force between the two States, and with general international law."

In any event, it is our judgment that international law casts considerable doubt on the legality of any reprisal against diplomats.

### *B. Domestic Law Implementing International Law*

It seems clear that the Vienna Convention and surrounding principles of customary international law have been incorporated as part of our domestic law. First, Article VI of the Constitution makes treaties part of the supreme law of the land, along with the Constitution and statutes. The Vienna Convention, ratified by the United States, includes an affirmation in its preamble that rules of customary law should govern questions not expressly regulated by the terms of the Convention.

Moreover, the Supreme Court has recognized customary international law as part of our domestic law. *See* L. Henkin, Foreign Affairs and the Constitution 221 (1972). In *The Paquete Habana*, 175 U.S. 677, 700 (1900), the Supreme Court held that under international law, fishing vessels belonging to enemy nationals were exempt from capture and condemnation by American vessels:

> International law is part of our law, and it must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.

A principal purpose of the Diplomatic Relations Act of 1978, 22 U.S.C. § 254a *et seq.*, was to "codify the privileges and immunities provisions of the Vienna Convention as the sole United States law on the subject," S. Rep. No. 958, *supra*, at 1, and to repeal inconsistent statutes. The Act also provides, in § 254c:

> The President may, on the basis of reciprocity and under such terms and conditions as he may determine, specify privileges and immunities for members of the mission, their families, and the diplomatic couriers of any sending state which result in more favorable treatment or less favorable treatment than is provided under the Vienna Convention.

The Report of the Senate Foreign Relations Committee, No. 958, *supra,* at 5, explains that this provision "reflects article 47 of the Convention which allows such treatment." The Report goes on:

> The conditions under which U.S. diplomatic personnel carry out their official functions and lead their lives in certain hardship areas dictate their enjoyment of increased protection from harassment as a result of arbitrary application of local law. This provision permits less favorable treatment than the Vienna Convention and covers those cases where certain nations restrict the privileges and immunities of U.S. diplomatic personnel abroad. Any use of the discretion described in this section must be on a reciprocal basis with the nations involved.

It is unclear whether this section means to go further than to codify Article 47 of the Convention, which allows only restrictive applications of the Convention's terms. It can be read to provide domestic authority to exercise the international law of reprisals, which would, however, presumably include the exception for reprisals against diplomats. The legislative history is barren of guidance except for the discussion quoted above, which refers to Article 47 and which seems to contemplate reciprocally restrictive travel provisions.

There is explicit authority for travel regulations in the Foreign Relations Authorization Act of 1979; Pub. L. No. 95-426, 22 U.S.C. § 2691 note:

> For the purpose of implementing general principles of the Final Act of the Conference on Security and Cooperation in Europe (signed at Helsinki on August 1, 1975) emphasizing the lowering of international barriers to the free movement of people and ideas and in accordance with provisions of the Vienna Convention on Diplomatic Relations establishing the legal principles of nondiscrimination and reciprocity, it shall be the general policy of the United States to impose restrictions on travel within the United States by citizens of another country only when the government of that country imposes restrictions on travel by United States citizens within that country.

The legislative history of this provision refers to it as "self-explanatory," and is otherwise unilluminating. H.R. Rep. No. 1160, 95th Cong., 2d Sess. (1978).

Thus there is ample international and domestic authority for travel restrictions on Iranian diplomatic personnel. But the line must be drawn at that point—anything amounting in substance to holding them hostage would entail a possible breach of international law. Instead, the traditional remedy against diplomats has been to declare them *persona non grata* and to expel them, even in cases of espionage.[4] There is even a possibility that internment of Iranian diplomatic personnel would run afoul of 18 U.S.C. § 112, which makes it a federal crime to assault or imprison a foreign diplomat. This provision, passed in response to terrorism at the Munich Olympics and elsewhere, focuses on ordinary criminal activity, but it is not in terms inapplicable to governmental abuse of diplomatic privileges and immunities.

### *C. Presidential Power Over Diplomatic Personnel*

The President's authority over foreign diplomatic personnel derives from his constitutional power in Article II to "receive Ambassadors and other Public Ministers." From this derives the President's power to grant or withdraw recognition to foreign governments and their ministers, a power regarded as textually committed to the Executive alone. *See Jones* v. *United States*, 137 U.S. 202, 212 (1890); *Baker* v. *Carr*, 369 U.S. 186, 212–13 (1962); *see generally* 2 B. Schwartz, The Powers of the President 104–09 (1963). The President's well-established power to recognize foreign governments without the participation of the other branches is a greater power than that involved in receiving a particular Ambassador of a recognized government, although it may flow logically enough from that power. As a consequence, the President's power to accept or reject a particular envoy has been beyond serious question since President Washington demanded the recall of Citizen Genet, the French Minister. As early as 1855, the Attorney General gave an opinion that the right of reception extends to "all possible diplomatic agents which any foreign power may accredit to the United States," 7 Op. Att'y Gen. 186, 209 (1855).

The legal status of foreign diplomatic personnel in the United States has its roots in these constitutional considerations and was well-defined long before the Vienna Convention codified it. In effect, persons with full diplomatic status bear the same relation to the United States as the government they serve; they are not subject to domestic law, and our rights and remedies with respect to them are diplomatic only. *See*

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[4] This is not the case for individuals with only a qualified immunity from criminal jurisdiction. The United States does not recognize violation of the espionage laws as part of a foreign employee's official function, and the limited immunity is no bar to prosecution for such violations. *See United States* v. *Egorov*, 222 F. Supp. 106, 107–08 (E.D.N.Y. 1963); *United States* v. *Melekh*, 190 F. Supp. 67, 87–89 (S.D. N.Y. 1960).

*Schooner Exchange* v. *McFaddon,* 11 U.S. (7 Cranch) 116, 138-39 (1812) (Marshall, Ch. J.), for a classic statement of this. The first American statutes granting immunity from our domestic law to diplomatic personnel date from 1790, and since the Citizen Genet affair, Presidents have declared foreign diplomatic personnel *persona non grata,* expelling them without explanation or process. Neither expulsion without procedural protections nor travel restrictions of the sort familiar both before and after ratification of the Vienna Convention would be tolerable for American citizens or nondiplomatic aliens. Professor Henkin concludes that "foreign governments, however, and probably foreign diplomats in their official capacity, have no constitutional rights, and there are no constitutional obstacles, say, to tapping wires of foreign embassies." Henkin, *supra,* at 254. (Professor Henkin's example regarding wiretapping presages a position taken by the Office of Legal Counsel in response to a request of the Permanent Select Committee on Intelligence in April, 1978.)

At the same time, aliens within our international jurisdiction are subject to our laws and are entitled to claim constitutional protections when the government has not granted them immunity. *See Mathews* v. *Diaz,* 426 U.S. 67, 77 (1976); *Wong Wing* v. *United States,* 163 U.S. 228, 237-38 (1896).

A consistent pattern emerges from these authorities. Diplomatic personnel, standing as surrogates for the nation they represent, are without the constraints of our domestic law and its protections as well. For example, no one would suggest that a diplomat has a First Amendment right to disparage the President without suffering expulsion as a consequence. But to the extent that immunity does not hold, with the exposure to our domestic law comes equally an opportunity to take advantage of its protections. Thus, no one would suggest that an alien may be tried for espionage without the observance of due process guarantees. *See Abel* v. *United States,* 362 U.S. 217 (1960).

In addition to these constitutional sources, the President can draw authority over diplomats from the provisions of the Diplomatic Relations Act and the Foreign Relations Authorization Act that are summarized above. Finally, there is a little-known 1868 statute, now 22 U.S.C. § 1732:

> Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship . . . , the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate

> the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.

This provision appears never to have been invoked; at least it has never been relied on in litigation to support presidential action. It was passed in response to a dispute with Great Britain after the Civil War, in which that nation was trying its former subjects, who had become naturalized Americans, for treason. A rejected amendment to the bill would have authorized the President to suspend all commerce with the offending nation, and to round up foreign citizens found in this country as hostages; even this harsh provision, however, excepted diplomatic personnel. Cong. Globe, 40th Cong., 2d Sess. 4205, 4445 (1868). Therefore, if this provision is to be relied on, it should be invoked for actions not involving diplomats.

In conclusion, the President has plenary powers to control the presence and movement in this country of foreign diplomatic personnel, short of violations of international law.

## II. Departure Controls

The Immigration and Nationality Act, 8 U.S.C. § 1185(a), provides

> Unless otherwise ordered by the President, it shall be unlawful—
>
> (1) for any alien to depart from . . . the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe. . . .

It is clear from the structure of the statute that the term "alien" as used in § 1185 includes diplomatic personnel. The definitions section of the Act, § 1101(a), defines alien as any person not a citizen of the United States (3), and includes diplomatic personnel among nonimmigrant aliens (15). Section 1102 of the Act makes the provisions on exclusion or deportation inapplicable to diplomatic personnel, except as otherwise provided. There is no parallel section exempting diplomatic personnel from departure controls.

Regulations implementing § 1185 have been issued by the Department of State, but are implemented by the departure control officers of the Immigration and Naturalization Service (INS). 22 C.F.R. § 46. The regulations provide in § 46.2 that no alien (defined in the statute's terms) shall depart, or attempt to depart, from the United States if his departure would be prejudicial to the interests of the United States under the provisions of § 46.3. Departure control officers, having reason to believe that § 46.3 applies, are instructed to serve the alien with a written temporary order directing him not to depart. In turn, § 46.3 defines categories of aliens whose departure shall be deemed prejudicial to the interests of the United States, and includes: fugitives from justice; aliens needed as witnesses or parties to criminal cases under investigation or pending in our courts; aliens needed in connection with investigations or proceedings being conducted by any official executive, legislative, or judicial agency in the United States; and aliens who may disclose defense information, engage in activities impeding our national defense, wage war against the United States, or help to deprive the United States of sources of supplies or materials vital to our national defense. There is also a final catchall category (k) for any alien whose case does not fall within any of the specified categories, "but which involves circumstances of a similar character rendering the alien's departure prejudicial to the interests of the United States." Any of a number of these provisions would seem adaptable to the present situation.

Section 46.7 of the regulations provides that in the absence of appropriate instructions from the State Department's Bureau of Security and Consular Affairs, departure control officers shall not exercise their authority to bar exit in the case of aliens seeking to depart in the status of diplomatic personnel (within a definition in § 1101(a)(15) that closely resembles those in the Diplomatic Relations Act). It goes on to provide, however, that in "cases of extreme urgency, where the national security so requires," a departure control officer may preliminarily exercise authority to bar exit pending the outcome of consultation with the Administrator, "which shall be undertaken immediately. In all cases arising under this section, the decision of the Administrator shall be controlling: *Provided,* That any decision to prevent the departure of an alien shall be based upon a hearing and record as prescribed in this part." The regulations provide that an alien served with a notice of temporary prevention of departure may within 15 days request a hearing before a Special Inquiry Officer of the INS. If a hearing is requested, the alien is entitled to appear, to be represented by counsel of his choice, and to have a trial-type hearing. The Special Inquiry Officer recommends disposition, and the record and any written appeals are transmitted to the Regional Commissioner, whose decision is administratively final.

### III. Restricting Criminal Immunity of Diplomatic Personnel

Under the Vienna Convention, diplomatic agents and administrative and technical staff are entitled to complete immunity from the criminal jurisdiction of the host state. However, the exercise of criminal jurisdiction over foreign diplomatic personnel might, as a matter of international law, be justified as a reprisal for Iranian breaches of the Convention. As noted above, there is a substantial argument that all reprisals against diplomatic personnel are illegal.[5] Moreover, reprisals become more difficult to justify as they become less clearly reciprocal in terms of nature or severity to the breach that has occurred. *See* Schwarzenberger, *supra,* at 184. Thus, house arrest of Iranian diplomats, because of its similarity to the imprisonment of our personnel, is easier to justify than criminal prosecution of a sort not yet imposed upon our hostages. There is also a serious danger that a reprisal of this sort might be thought to justify the exercise of Iranian criminal jurisdiction, in particular regarding espionage, over our personnel. Therefore, if any criminal jurisdiction is asserted over Iranian diplomatic personnel, it is particularly important to specify the aspects of the criminal law to which they are being subjected. This could be done by notification that violations of Executive Order No. 12,170 and the criminal provisions of the IEEPA, 50 U.S.C. § 1705, will result in criminal prosecution.

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[5] Support for such an argument in this application might be found in the World Court's order to Iran to afford our diplomats "immunity from any form of criminal jurisdiction."

Moreover, as a matter of American constitutional law, it is clear from the preceding analysis that Iranian personnel subjected to criminal prosecution would be entitled to due process protections. Before encountering criminal liability, they would need to be placed on notice that we regard their conduct as subject to our domestic criminal law, in particular the provisions of the IEEPA.

Although there is some basis in law for subjecting Iranian diplomatic personnel to our criminal statute enforcing the freeze order, assertion of our criminal jurisdiction over these persons is fraught with danger. Moreover, since the existence of the freeze should prevent those dealing with the affected governmental instrumentalities from distributing property to them, it is not apparent that serious violations are likely to occur. We urge strongly against any formal assertion that Iranian diplomatic personnel are subject to this aspect of our criminal law.

LARRY A. HAMMOND
*Deputy Assistant Attorney General*
*Office of Legal Counsel*

# Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization

**The President's inherent, constitutional authority as Commander-in-Chief, his broad foreign policy powers, and his duty to take care that the laws be faithfully executed generally empower him to deploy the armed forces abroad without a declaration of war by Congress or other congressional authorization. A historical pattern of presidential initiative and congressional acquiescence in emergency situations calling for immediate action, including situations involving rescue and retaliation, confirm this inherent power, and the courts have generally declined to review its use.**

**The War Powers Resolution generally precludes presidential reliance on statutory authority for military actions clearly involving hostilities, unless a statute expressly authorizes such actions, and regulates the President's use of his constitutional powers in this regard. In particular, it introduces consultation and reporting requirements in connection with any use of the armed forces, and requires the termination of such use within 60 days or whenever Congress so directs.**

**The term "United States Armed Forces" in the War Powers Resolution does not include military personnel detailed to and under the control of the Central Intelligence Agency. [In an opinion issued on October 26, 1983, published as an appendix to this opinion, this conclusion is reconsidered and reversed.]**

**The term "hostilities" in the War Powers Resolution does not include sporadic military or paramilitary attacks on our armed forces stationed abroad; furthermore, its applicability requires an active decision to place forces in a hostile situation rather than their simply acting in self-defense.**

**The requirement of consultation in the War Powers Resolution is not on its face unconstitutional, though it may, if strictly construed, raise constitutional questions.**

**The provision in the War Powers Resolution permitting Congress to require removal of our armed forces in particular cases by passage of a concurrent resolution not presented to the President is a *prima facie* violation of Article I, § 7 of the Constitution.**

February 12, 1980

## MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This responds to your request for our review of certain questions regarding the effect of the War Powers Resolution on the President's power to use military force without special congressional authorization and related issues. We have considered the President's existing power to employ the armed forces in any of three distinct kinds of operations: (1) deployment abroad at some risk of engagement—for example, the current presence of the fleet in the Persian Gulf region; (2) a military expedition to rescue the hostages or to retaliate against Iran if the hostages are harmed; (3) an attempt to repel an assault that threatens our vital interests in that region. We believe that the President has constitutional authority to order all of the foregoing operations.

We also conclude that the War Powers Resolution, 50 U.S.C. §§ 1541–1548, has neither the purpose nor the effect of modifying the President's power in this regard. The Resolution does, however, impose procedural requirements of consultation and reporting on certain presidential actions, which we summarize. The Resolution also provides for the termination of the use of the armed forces in hostilities within 60 days or sooner if directed by a concurrent resolution of Congress. We believe that Congress may terminate presidentially initiated hostilities through the enactment of legislation, but that it cannot do so by means of a legislative veto device such as a concurrent resolution.

## I. The President's Constitutional Authority to Employ the Armed Forces

The centrally relevant constitutional provisions are Article II, § 2, which declares that "the President shall be Commander in Chief of the Army and Navy of the United States," and Article I, § 8, which grants Congress the power "To declare War." Early in our constitutional history, it perhaps could have been successfully argued that the Framers intended to confine the President to directing the military forces in wars declared by Congress.[1] Even then, however, it was clear that the Framers contemplated that the President might use force to repel sudden invasions or rebellions without first seeking congressional approval.[2]

In addition to the Commander-in-Chief Clause, the President's broad foreign policy powers support deployment of the armed forces abroad.[3] The President also derives authority from his duty to "take Care that the Laws be faithfully executed,"[4] for both treaties and customary international law are part of our law and Presidents have repeatedly asserted authority to enforce our international obligations[5] even when Congress has not enacted implementing legislation.

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[1] Hamilton, in The Federalist No. 69, disparaged the President's power as that of "first General and Admiral" of the Nation, contrasting it to that of the British king, who could declare war and raise and regulate armies.

[2] *See* M. Farrand, 2 The Records of the Federal Convention of 1787, 318–19 (1911). Other presidential actions, such as protecting American lives and property abroad and defending our allies, were not directly considered by the Framers. This is understandable: the military needs of the 18th century probably did not require constitutional authority for immediate presidential action in case of an attack on an ally.

[3] *See generally United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

[4] *See In re Neagle*, 135 U.S. 1 (1890) (broad view of inherent presidential power to enforce constitutional as well as statutory provisions).

[5] It should be observed, however, that treaties may not modify the basic allocation of powers in our constitutional scheme. *Reid* v. *Covert*, 354 U.S. 1 (1957). Mutual defense treaties are generally not self-executing regarding the internal processes of the signatory powers. Similarly, customary international law, which includes authority for reasonable reprisals in response to another country's breach of international obligation, probably does not confer authority on the President beyond the warrant of necessity.

We believe that the substantive constitutional limits on the exercise of these inherent powers by the President are, at any particular time, a function of historical practice and the political relationship between the President and Congress. Our history is replete with instances of presidential uses of military force abroad in the absence of prior congressional approval. This pattern of presidential initiative and congressional acquiescence may be said to reflect the implicit advantage held by the executive over the legislature under our constitutional scheme in situations calling for immediate action. Thus, constitutional practice over two centuries, supported by the nature of the functions exercised and by the few legal benchmarks that exist, evidences the existence of broad constitutional power.[6]

The power to deploy troops abroad without the initiation of hostilities is the most clearly established exercise of the President's general power as a matter of historical practice. Examples of such actions in the past include the use of the Navy to "open up" Japan, and President Johnson's introduction of the armed forces into the Dominican Republic in 1965 to forestall revolution.

Operations of rescue and retaliation have also been ordered by the President without congressional authorization even when they involved hostilities. Presidents have repeatedly employed troops abroad in defense of American lives and property. A famous early example is President Jefferson's use of the Navy to suppress the Barbary pirates. Other instances abound, including protection of American citizens in China during the Boxer Rebellion in 1900, and the use of troops in 1916 to pursue Pancho Villa across the Mexican border. Recent examples include the Danang sealift during the collapse of Vietnam's defenses (1975); the evacuation of Phnom Penh (Cambodia, 1975); the evacuation of Saigon (1975); the *Mayaguez* incident (1975); evacuation of civilians during the civil war in Lebanon (1976); and the dispatch of forces to aid American victims in Guyana (1978).

This history reveals that purposes of protecting American lives and property and *retaliating* against those causing injury to them are often intertwined. In *Durand* v. *Hollins*, 8 F. Cas. 111 (No. 4186) (C.C.S.D.N.Y. 1860), the court upheld the legality of the bombardment of a Nicaraguan town which was ordered because the local authorities refused to pay reparations for an attack by a mob on the United States Consul. Policies of deterrence seem to have eroded any clear distinction between cases of rescue and retaliation.

Thus, there is much historical support for the power of the President to deploy troops without initiating hostilities and to direct rescue and retaliation operations even where hostilities are a certainty. There is precedent as well for the commitment of United States armed forces, without prior congressional approval or declaration of war, to aid an ally in repelling an armed invasion, in President Truman's response to the North Korean invasion of South Korea.[7] But clearly such a response cannot be sustained over time without the acquiescence, indeed the approval, of Congress, for it is Congress that must appropriate the money to fight a war or a police action. While Presidents have exercised their authority to introduce troops into Korea and Vietnam[8] without prior congressional authorization, those troops remained only with the approval of Congress.

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[6] In other contexts, the Supreme Court has recognized the validity of longstanding presidential practices never expressly authorized by Congress but arguably ratified by its silence. *See United States* v. *Midwest Oil Co.*, 236 U.S. 459 (1915) (withdrawal of public lands from private acquisition).

## II. Judicial Review of the President's Exercise of Constitutional Power

In the only major case dealing with the role of the courts with regard to this general subject, the Supreme Court upheld presidential power to act in an emergency without prior congressional authority. In the *Prize Cases,* 67 U.S. 635 (1863), the Court upheld President Lincoln's blockade of Southern ports following the attack on Fort Sumter. The Court thought that particular uses of inherent executive power to repel invasion or rebellion were "political questions" not subject to judicial review: "This Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted." (*Id.* at 670). The Court's unwillingness to review the need for presidential action in a particular instance in the *Prize Cases* or since has left the field to the President and Congress; much has depended on presidential restraint in responding to provocation, and on congressional willingness to support his initiatives by raising and funding armies.

More recently, the courts have applied the rationale of the *Prize Cases* to avoid judicial review of the constitutionality of the President's actions with regard to the Vietnam conflict.[9] Although the Supreme Court did not hear argument in the case, we believe some significance may be attached to the Court's summary affirmance of a three-judge court's decision that the constitutionality of the government's involvement in that conflict was a political question and thus unsuitable for judicial resolution. *Atlee* v. *Laird,* 347 F. Supp. 689 (E.D.Pa. 1972), *aff'd,* 411 U.S. 911 (1973).

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[7] Although support for this introduction of our armed forces into a "hot" war could be found in the U.N. Charter and a Security Council resolution, the fact remains that this commitment of substantial forces occurred without congressional approval.

[8] The substantial American military presence in Vietnam before the Tonkin Gulf Resolution was known to and supported by Congress.

[9] *See, e.g., Mora* v. *McNamara,* 387 F.2d 862 (D.C. Cir.), *cert. denied* 389 U.S. 934 (1967); *McArthur* v. *Clifford,* 393 U.S. 1002 (1968); *Massachusetts* v. *Laird,* 400 U.S. 886 (1970).

## III. The President's Statutory Powers

Congress has restricted the President's ability to rely on statutory authority for the use of armed force abroad by its provision in the War Powers Resolution that authority to introduce the armed forces into hostilities or into situations "wherein involvement in hostilities is clearly indicated by the circumstances" is not to be inferred from any statutory provision not specifically authorizing the use of troops and referring to the War Powers Resolution. 50 U.S.C. § 1547. Thus, the President may not rely on statutory authority for military actions clearly involving hostilities unless the statute expressly authorizes such actions.

Nevertheless, it may be possible for the President to draw authority for some actions not involving the use of the armed forces in actual or imminent hostilities from the provisions of an 1868 statute, now 22 U.S.C. § 1732:

> Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.

We are unaware of any instances in which this provision has been invoked. It was passed in response to a dispute with Great Britain after the Civil War, in which that nation was trying its former subjects, who had become naturalized Americans, for treason. The House version of the bill, which would have authorized the President to suspend all commerce with the offending nation and to round up its citizens found in this country as hostages, was replaced by the present language which was in the Senate bill. Cong. Globe, 40th Cong., 2d Sess. 4205, 4445–46 (1868). It is not clear whether this change was meant to restrict the President to measures less drastic than those specified in the House bill. It is also not clear what Congress meant by the phrase "not amounting to acts of war." At least Congress did not seem to be attempting to limit the President's constitutional powers.

## IV. The War Powers Resolution

The War Powers Resolution, 50 U.S.C. §§ 1541–48, begins with a statement of purpose and policy that seems designed to limit presidential use of armed forces in hostilities to situations involving a declaration of war, specific statutory authorization, or an attack on the United States, its possessions, or its armed forces. This policy statement, however, is not to be viewed as limiting presidential action in any substantive manner. That much is clear from the conference report, which states that subsequent portions of the Resolution are not dependent on the policy statement,[10] and from its construction by the President since its enactment.

The important provisions of the Resolution concern consultation and reporting requirements and termination of the involvement of the armed forces in hostilities. The Resolution requires that the President consult with Congress "in every possible instance" before introducing the armed forces into hostilities, and regularly thereafter. 50 U.S.C. § 1542.

The reporting requirements apply not only when hostilities are taking place or are imminent, but also when armed forces are sent to a foreign country equipped for combat. 50 U.S.C. § 1543(a)(2), (3). The report must be filed within 48 hours from the time that they are introduced into the area triggering the requirement, and not from the time that the decision to dispatch them is made.[11] The report must include:

> (A) The circumstances necessitating the introduction of United States Armed Forces;
>
> (B) the constitutional and legislative authority under which such introduction took place; and
>
> (C) the estimated scope and duration of the hostilities or involvement.

50 U.S.C. § 1543(a)(3). Reports which have been filed in the past have been brief and to the point. The reference to legal authority has been one sentence, referring to the President's constitutional power as Commander-in-Chief and Chief Executive.[12]

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[10] *See* H.R. Rep. No. 547, 93d Cong., 1st Sess. 8 (1973). Section 1547(d)(1) states that the Resolution is not intended to alter the constitutional authority of the President. Fisher, *A Political Context for Legislative Vetos*, 93 Political Science Quarterly 241, 246 (1978), explains that because the two Houses could not agree on the President's responsibilities under Article II, Congress fell back on purely procedural controls.

[11] *See generally* Franck, *After the Fall: The New Procedural Framework for Congressional Control over the War Power*, 71 Am. J. Int'l L. 605, 615 (1977).

[12] *See War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident, Hearings before the Subcommittee on Int'l Security and Scientific Affairs of the House Comm. on Int'l Relations*, 94th Cong., 1st Sess. 75 (Mayaguez) (1975) (hereafter *War Powers: A Test of Compliance*); *The War Powers Resolution, Relevant Documents, Correspondence, Reports*, Subcomm. on Int'l Security and Scientific Affairs, House Comm. on Int'l Relations, 94th Cong., 1st Sess. 40 (Danang); 42 (Phnom Penh); 45 (*Mayaguez*) (Comm. Print 1976).

The Resolution requires the President to terminate any use of the armed forces in hostilities after 60 days unless Congress has authorized his action.[13] It also requires termination whenever Congress so directs by concurrent resolution.[14]

As enacted, the ambiguous language of the Resolution raises several issues of practical importance regarding the scope of its coverage as well as questions of constitutional magnitude. We shall discuss first several issues related to the scope of its coverage and then discuss several constitutional issues it raises.

A threshold question is whether the Resolution's use of the term "United States Armed Forces" was intended to reach deployment or use by the President of personnel other than members of the Army, Air Force, Marine Corps, Navy, or Coast Guard functioning under the control of the Secretary of Defense and the Joint Chiefs of Staff. For example, does it extend to military personnel detailed to and under the control of the Central Intelligence Agency (CIA), CIA agents themselves, or other individuals contracting to perform services for the CIA or the Department of Defense? We believe that none of these personnel are covered by the Resolution.*

The provision most closely on point is § 1547(c), which defines the term "introduction of United States Armed Forces" to include "the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country" in actual or imminent hostilities. This provision appears to be intended to identify activities subject to the Resolution, and not the identity of persons constituting "members of such armed forces." It could be argued that anyone officially a member of the armed forces of this country, although on temporary detail to a civilian agency, is within this provision and therefore covered by the Resolution. The legislative history of the Resolution, however, persuades us to take a contrary view. In the Senate, where § 1547(c) originated, Senator Eagleton introduced the following amendment:

> Any person employed by, under contract to, or under the direction of any department or agency of the United States Government who is either (a) actively engaged in hostilities in any foreign country; or (b) advising any regular or irregular military forces engaged in hostilities in any foreign country shall be deemed to be a member of

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[13] 50 U.S.C. § 1544(b). There are exceptions to the 60-day period if Congress extends the period or is unable to meet, or if the President certifies that more time is needed to extract the forces.

[14] 50 U.S.C. § 1544(c).

*NOTE: This conclusion respecting the applicability of the War Powers Resolution to military personnel detailed to the Central Intelligence Agency was reconsidered and reversed in an opinion dated October 26, 1983, which appears as an appendix to this opinion at p. 197 *infra*. Ed.

> the Armed Forces of the United States for the purposes of this Act.

He explained that it was intended to cover CIA paramilitary operations involving persons who might be military officers under contract to the CIA. 119 Cong. Rec. 25,079–83 (1973). He recognized that without this amendment the Resolution as drafted would not cover the activities of such personnel, and argued that it should, citing CIA activities in Laos as leading to America's Indo-China involvement. Senators Muskie and Javits opposed the amendment, principally for reasons of committee jurisdiction. They argued that if the Resolution were extended to cover the CIA, its chances to escape presidential veto might be jeopardized, and that the matter should be considered pursuant to proposed legislation to govern the CIA. Senator Javits also argued that the amendment was overbroad, since it would include foreign nationals contracting with the CIA. He argued that CIA activities should not be within the Resolution, because the CIA lacks the appreciable armed force that can commit the Nation to war. Senator Fulbright came to Senator Eagleton's defense, arguing that the amendment, applying to the CIA and DOD civilians alike, would avoid circumvention of the Resolution. *Id.* at 25,083–84. No one suggested that the Resolution would apply to anyone other than military personnel under Department of Defense control unless the amendment passed. The amendment was defeated.[15]

In the House of Representatives, Congressman Badillo asked Congressman Zablocki, the manager of the bill, whether he would support in the conference committee a Senate provision that would include the CIA within the bill when it carried out military functions. Congressman Zablocki replied that he would support the Eagleton amendment if it passed the Senate. 119 Cong. Rec. 24,697 (1973).

Another provision of the Resolution that had its source in the House is consistent with the view that the Resolution was not intended to apply to CIA paramilitary activities. The reporting requirements of § 1543(a)(2) apply when the armed forces are introduced "into the territory, air space or waters of a foreign nation, while equipped for combat . . . ." It is clear from H.R. Rep. No. 287, 93d Cong., 1st Sess. 8 (1973), that this provision was using the term "armed forces" to mean significant bodies of military personnel:

> A report would be required any time combat military forces were sent to another nation to alter or preserve the existing political status quo or to make the U.S. presence felt. Thus, for example, the dispatch of Marines to Thai-

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[15] It is an accepted canon of statutory construction that the rejection of an amendment indicates that the bill is not meant to include the provisions in the failed amendment. *See, e.g., Norwegian Nitrogen Products Co. v. United States,* 288 U.S. 294, 306 (1933).

> land in 1962 and the quarantine of Cuba in the same year would have required Presidential reports.

A companion provision reinforces the view that the Resolution applies only to significant bodies of military personnel. The House report goes on to discuss § 1543(a)(3), which requires a report when the number of armed forces equipped for combat is substantially enlarged in a foreign nation. For examples of substantial increases in combat troops, the report gives the dispatch of 25% more troops to an existing station, or President Kennedy's increase in U.S. military advisers in Vietnam from 700 to 16,000 in 1962.

The second threshold question raised by the War Powers Resolution regards the meaning of the word "hostilities" as used in § 1543(a)(1). In the 1975 hearings on executive compliance with the Resolution, Chairman Zablocki of the Subcommittee on International Security and Scientific Affairs drew the Legal Adviser's attention to a discussion of "hostilities" in the House report on the Resolution:

> The word *hostilities* was substituted for the phrase *armed conflict* during the subcommittee drafting process because it was considered to be somewhat broader in scope. In addition to a situation in which fighting actually has begun, *hostilities* also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict. *"Imminent hostilities"* denotes a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict.

H.R. Rep. No. 287, 93d Cong., 1st Sess. 7 (1973) (emphasis added). Chairman Zablocki then requested the views of the Departments of State and Defense regarding the Executive's interpretation of the term "hostilities" in view of the language quoted above. Those Departments responded in a letter to the Chairman dated June 5, 1975, *reprinted* in *War Powers: A Test of Compliance* at 38–40. After first noting that "hostilities" is "definable in a meaningful way only in the context of an actual set of facts," the letter went on to state that, as applied by the Executive, the term included:

> a situation in which units of the U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces, and "imminent hostilities" was considered to mean a situation in which there is a serious risk from hostile fire to the safety of United States forces. In our view, neither term necessarily encompasses irregular or infrequent violence which may occur in a particular area.

*Id.* at 39.

We agree that the term "hostilities" should not be read necessarily to include sporadic military or paramilitary attacks on our armed forces stationed abroad. Such situations do not generally involve the full military engagements with which the Resolution is primarily concerned. For the same reason, we also believe that as a general matter the presence of our armed forces in a foreign country whose government comes under attack by "guerrilla" operations would not trigger the reporting provisions of the War Powers Resolution unless our armed forces were assigned to "command, coordinate, participate in the movement of, or accompany" the forces of the host government in operations against such guerrilla operations.[16] 50 U.S.C. § 1547(c).

Furthermore, if our armed forces otherwise lawfully stationed in a foreign country were fired upon and defended themselves, we doubt that such engagement in hostilities would be covered by the consultation and reporting provisions of the War Powers Resolution. The structure and thrust of those provisions is the "introduction" of our armed forces into such a situation and not the fact that those forces may be engaged in hostilities. It seems fair to read "introduction" to require an active decision to place forces in a hostile situation rather than their simply acting in self-defense.[17]

A final issue of statutory construction involves interpretation of the requirement for consultation with "Congress."[18] As a practical matter, consultation with more than a select group of congressional leaders has never been attempted. The Legal Adviser of the State Department has argued for this Administration, correctly in our view, that there are practical limits to the consultation requirement; he has said that meaningful consultations with "an appropriate group of congressional representatives should be possible."[19] During the *Mayaguez* incident about ten House and eleven Senate Members were contacted concerning the measures to be taken by the President.[20]

In requiring consultation in "every possible instance," Congress meant to be firm yet flexible. H. R. Rep. No. 287, 93d Cong., 1st Sess. 6 (1973). The House report continued:

> The use of the word "every" reflects the committee's belief that such consultation *prior* to the commitment of armed forces should be inclusive. In other words, it

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[16] We believe that the definition of "introduction of United States Armed Forces" in § 1547(c) supports the proposition that members of the armed forces stationed in a foreign country for purposes of training or advising military forces of the host government are not generally to be viewed as subject to the War Powers Resolution.

[17] In contrast, as passed by the Senate, the bill would have required a report whenever our armed forces are "engaged in hostilities." S. 440, 93d Cong., 1st Sess. § 4, 119 Cong. Rec. 25,119 (1973).

[18] This replaced an earlier version which merely required consultation with the leadership and appropriate committees of Congress. H. R. Conf. Rep. No. 547, 93d Cong., 1st Sess. 8 (1973); H. R. Rep. No. 287, 93d Cong., 1st Sess. 6 (1973).

[19] Statement of State Department Legal Adviser Hansell before the Senate Foreign Relations Committee, reprinted in State Department Bulletin, August 29, 1977, at 291–92.

[20] Testimony of State Department Legal Adviser Leigh in *War Powers: A Test of Compliance* at 78.

> should apply to extraordinary and emergency circumstances—even when it is not possible to get formal congressional approval in the form of a declaration of war or other specific authorization.
>
> At the same time, through use of the word "possible" it recognizes that a situation may be so dire, e.g., hostile missile attack underway, and require such instantaneous action that no prior consultation will be possible.

The State Department Legal Adviser, again speaking for this Administration, has pointed out the problem that exists in emergencies, noting that "[B]y their very nature some emergencies may preclude opportunity for legislative debate prior to involvement of the Armed Forces in hostile or potentially hostile situations." He recognized, however, that consultation may be had "in the great majority of cases." [21]

There may be constitutional considerations involved in the consultation requirement. When President Nixon vetoed the Resolution, he did not suggest that either the reporting or consultation requirements were unconstitutional. Department of State Bulletin, November 26, 1973, at 662-64. No Administration has taken the position that these requirements are unconstitutional on their face. Nevertheless, there may be applications which raise constitutional questions. This view was stated succinctly by State Department Legal Adviser Leigh:

> Section 3 of the War Powers Resolution has, in my view, been drafted so as not to hamper the President's exercise of his constitutional authority. Thus, Section 3 leaves it to the President to determine precisely how consultation is to be carried out. In so doing the President may, I am sure, take into account the effect various possible modes of consultation may have upon the risk of a breach in security. Whether he could on security grounds alone dispense entirely with "consultation" when exercising an independent constitutional power, presents a question of constitutional and legislative interpretation to which there is no easy answer. In my personal view, the resolution contemplates at least some consultation in every case irrespective of security considerations unless the President determines that such consultation is inconsistent with his constitutional obligation. In the latter event the President's decision could not as a practical matter be challenged but he would have to be prepared to accept the political consequences of such action, which might be heavy.

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[21] Statement of Legal Adviser Hansell, *id.*

*War Powers: A Test of Compliance* at 100. Other constitutional issues raised by the Resolution concern the provisions terminating the use of our armed forces either through the passage of time (60 days) or the passage of a concurrent resolution.

We believe that Congress may, as a general constitutional matter, place a 60-day limit on the use of our armed forces as required by the provisions of § 1544(b) of the Resolution. The Resolution gives the President the flexibility to extend that deadline for up to 30 days in cases of "unavoidable military necessity." This flexibility is, we believe, sufficient under any scenarios we can hypothesize to preserve his constitutional function as Commander-in-Chief. The practical effect of the 60-day limit is to shift the burden to the President to convince the Congress of the continuing need for the use of our armed forces abroad. We cannot say that placing that burden on the President unconstitutionally intrudes upon his executive powers.

Finally, Congress may regulate the President's exercise of his inherent powers by imposing limits *by statute*. We do not believe that Congress may, on a case-by-case basis, require the removal of our armed forces by passage of a concurrent resolution which is not submitted to the President for his approval or disapproval pursuant to Article I, § 7 of the Constitution.

John M. Harmon
*Assistant Attorney General*
*Office of Legal Counsel*

# APPENDIX

## War Powers Resolution: Detailing of Military Personnel to the CIA

October 26, 1983

## MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

This responds to your inquiry whether a Central Intelligence Agency (CIA) operation utilizing military equipment and military personnel detailed to the CIA would require compliance with the War Powers Resolution. In responding to this inquiry, this Office has found it necessary to re-examine and revise a broad conclusion expressed by this Office in its February 12, 1980 memorandum, the "Harmon Memorandum,"[1] that "military personnel detailed to and under the control of the CIA . . ." would not be covered by the War Powers Resolution were they to be deployed into hostilities or a situation otherwise triggering that Resolution.

The heart of the argument in the Harmon Memorandum is the essentially negative inference drawn from the Senate's rejection of the so-called "Eagleton amendment,"[2] which is reprinted on page 8 of that memorandum. The Eagleton amendment would have supplemented § 8(c) of the War Powers Resolution regarding the definition of the term "introduction of United States Armed Forces." As enacted, § 8(c) now provides:

> For purposes of this chapter, the term "introduction of United States Armed Forces" includes the assignment of members of such armed forces to command, coordinate,

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[1] Memorandum for the Attorney General entitled "Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization" from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, Feb. 12 1980. The occasion for this memorandum was planning relative to the holding by Iran of American hostages and a range of potential American responses to that situation including a possible rescue attempt. The memorandum was general, however, and did not focus on a specific factual situation. Particularly, the Harmon Memorandum's comments concerning a CIA operation involving detailed military personnel was a part of a general discussion and was not in response to a precise fact-specific question.

[2] Senator Eagleton introduced several amendments to the War Powers Resolution. Some were adopted. This particular amendment was enumerated as amendment No. 366, and is set out in 119 Cong. Rec. 25,079 (1973).

> participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.

50 U.S.C. § 1547(c). Senator Eagleton urged adding the following sentence:

> Any person employed by, under contract to, or under the direction of any department or agency of the United States Government who is either (a) actively engaged in hostilities in any foreign country; or (b) advising any regular or irregular military forces engaged in hostilities in any foreign country shall be deemed to be a member of the Armed Forces of the United States for the purposes of this Act.

119 Cong. Rec. 25,079 (1973).

We observe at the outset that the Eagleton amendment on its face does not suggest that it deals with a situation in which uniformed personnel would be detailed to the CIA; indeed, what it would have done on its face was to provide that all government employees under the direction of *any* department or agency either engaged in hostilities in any foreign country or advising any regular or irregular military forces engaged in hostilities would be deemed to be a member of the armed forces for purposes of the War Powers Resolution. In other words, military or paramilitary activities by the CIA would have triggered the War Powers Resolution irrespective of whether the activities were performed by military personnel, civilian employees, or persons under contract to or under the control of the CIA.

The sentences in the Harmon memorandum that follow the quotation of the Eagleton amendment read as follows:

> He [Senator Eagleton] explained that it [his amendment] was intended to cover CIA paramilitary operations involving persons who might be military officers under contract to the CIA. 119 Cong. Rec. 25079–83 (1973). He recognized that without this amendment the Resolution as drafted would not cover the activities of such personnel, and argued that it should, citing CIA activities in Laos as leading to America's Indo-China involvement.

We have carefully reviewed not only the remarks of Senator Eagleton contained in the cited pages of the Congressional Record, but also the full Senate debate on the Eagleton amendment. We have been unable to find a single remark made by Senator Eagleton or any other Senator that reasonably could be read to support the assertion contained in the sentences quoted above from the Harmon Memorandum. In fact, Senator Eagleton and the other Senators who spoke at length for or against the Eagleton amendment manifested an understanding that the debate revolved around the CIA's potential use of *civilian* personnel to conduct combat operations rather than situations in which the conduct of the same operations by military forces might occur. Senator Eagleton and his principal ally in the floor debate, Senator Fulbright, repeatedly expressed the view that failing to include activities which the CIA might conduct with civilian personnel was a major "loophole" which would allow Presidents to evade the War Powers Resolution. The whole point of the Eagleton amendment, which emerges with considerable clarity once the legislative history is examined closely, is that Senator Eagleton intended that *civilian* forces were to be treated the same as military forces for purposes of application of the War Powers Resolution:

> My amendment would circumscribe the President's use of American *civilian* combatants in the same manner uniformed Armed Forces are circumscribed by S. 440 as presently drafted. It would, in other words, prevent a President from engaging *American civilians*, either directly or as advisers, in a hostile situation without the express consent of Congress.

119 Cong. Rec. 25,079 (1973) (emphasis added). Thus, Senator Eagleton spoke at considerable length about his concern that wars or lengthy and costly military engagements could be caused by CIA covert civilian operations. The discussion did not relate to covering, by this amendment, the detailing of military personnel to the CIA.

Furthermore, the record implies, albeit less strongly on this point, that CIA activities which actually used military personnel would be covered by the War Powers Resolution irrespective of the Eagleton amendment.

The closest that Senator Eagleton himself comes to saying something similar to what was attributed to him by the Harmon Memorandum is in a paragraph that reads as follows:

> So military activities will be carried on by *civilian* employees of the Pentagon, because under the War Powers bill nothing prevents the Pentagon from hiring or contracting with civilian employees, *ex-military* people perhaps, but people that are called civilians.

*Id.* at 25,083 (emphasis added).

Senator Eagleton's statements do not support the argument that the Eagleton amendment was an attempt to expand the War Powers Resolution to embrace CIA activities using military personnel. When examined in their full context, it was concern over *any* American involvement in a military context which the Eagleton amendment was intended to address. He also said:

> unless we treat all Americans in military situations alike, whether they are wearing a green uniform, red-white-and-blue or a seersucker suit with arms—what payroll you are on is really secondary; whether you get it from the Pentagon or whether you become a member of the Armed Forces, the end result is the same: Americans are exposed to the risk of war. And as they are exposed to the risk of war, the country, then makes a commitment to war.

*Id.* at 25,080 (1973).

In this same debate, Senator Javits, speaking in opposition to the Eagleton amendment, stated his understanding of the applicability of the War Powers Resolution to paramilitary activities conducted by the CIA as follows:

> Another important consideration is that there [is] outside the Armed Forces . . . no agency of the United States which has any appreciable armed forces power, not even the CIA. They [the CIA] might have some clandestine agents with rifles and pistols engaging in dirty tricks, but there is no capability of appreciable military action that would amount to war. Even in the Laotian war, the regular U.S. Armed Forces had to be called in to give air support. *The minute combat air support is required you have the Armed Forces, and the [War Powers Resolution] becomes operative.*

*Id.* at 25,082 (emphasis added).

This debate over the Eagleton amendment stands rather clearly for the proposition that CIA civilian operations (at least most of them) were not embraced by the War Powers Resolution as ultimately passed by the Congress unadorned with the Eagleton amendment. We do not believe the negative inference to be drawn from the defeat of the Eagleton amendment can be stretched further than to confirm that CIA civilian operations are not embraced by the War Powers Resolution.

In summary, we believe the legislative history relied on in the Harmon Memorandum supports the proposition that Congress assumed that the CIA's use of civilian or ex-military personnel would not trigger the War Powers Resolution. We do not believe that that legislative history may be relied upon for the conclusion that the involvement of

**military personnel, if temporarily detailed to the CIA and under civilian control, would remain outside the War Powers Resolution.**

**THEODORE B. OLSON**
***Assistant Attorney General***
***Office of Legal Counsel***

# Vesting of Iranian Assets

**Because the International Emergency Economic Powers Act does not authorize vesting of foreign property, and the Trading with the Enemy Act authorizes vesting only in wartime, in the absence of a declaration of war against Iran it would be necessary to seek new legislation in order for the United States to take title to the blocked Iranian assets.**

**No domestic constitutional issue would be raised by legislation authorizing the vesting of Iranian government property; moreover, vesting for the benefit of either private claimants or the U.S. government would be consistent with principles of international law, either as a self-help method of securing payment for damages, or as a reprisal for Iran's continuing violations of international law.**

**Vesting legislation would have little effect on pending domestic litigation involving the blocked Iranian assets, and its effect on pre-judgment attachments would depend upon the validity of such attachments under state law. Vesting legislation would not be enforceable against property located abroad, and would therefore have no effect on foreign litigation involving Iranian dollar deposits in U.S. branch banks abroad, unless foreign courts were to hold that such dollar deposits are in reality located at the home office of the banks in the United States.**

March 12, 1980

## MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

We have been asked to address a number of issues relating to possible vesting of Iranian assets. This preliminary response has been prepared in cooperation with the Civil Division.

### I. Existing Authority

At present no Iranian assets have been vested or seized. Vesting is a process by which the United States would take title to assets of a foreign country or its nationals. Under Executive Order No. 12,170 of November 14, 1979, the President blocked property of the Iranian government, its instrumentalities, and the Central Bank of Iran. 3 C.F.R. 457 (1979). The blocking order prevents property from being transferred or withdrawn, but does not permit its use by the United States or change title to it. This action was taken pursuant to the International Emergency Economic Powers Act, 50 U.S.C. § 1701 (Supp. I 1977) (IEEPA). This Act does not, however, provide authority to vest property.[1]

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[1] No private property of Iranian nationals was blocked although the IEEPA is broad enough to permit this. It would be necessary for the President to issue an additional order to accomplish blocking

Continued

The Trading with the Enemy Act provides for both blocking and vesting of foreign property. 50 U.S.C. App. § 5(b). Until 1977, when the International Economic Powers Act was enacted, the Trading with the Enemy Act applied both during wartime and during any other period of national emergency declared by the President. It was amended, however, so that it now applies only during wartime. 91 Stat. 1625 (1977). Therefore, the national emergency relating to Iran declared by the President on November 14, 1979, does not trigger the Trading with the Enemy Act. If the Trading with the Enemy Act were to be used it would be necessary to declare war. In the absence of such a declaration it would be necessary to seek new legislation. We make no recommendation as to whether or not the United States should declare war on Iran.

## II. Proposed Legislation

If the Administration seeks legislation permitting vesting of Iranian assets a number of policy and legal questions would have to be faced. These include whether to provide in the legislation for disposition of the assets once vested and what that disposition should be.

We do not think that any domestic constitutional issue arises in the taking of Iranian government property. The Fifth Amendment by its terms applies only to the taking of "private property" without just compensation. Thus, on its face the Just Compensation Clause does not apply. The role of the Constitution in domestic law, as well as the text, supports this conclusion. Constitutional protections limit the power of the United States to act upon persons who are subject to its power by virtue of their presence in this country or their activities here. The United States asserts its power with respect to foreign nations because as a sovereign among equals it enjoys powers and privileges under international law and not because of its domestic authority.[2] *Cf. United States* v. *Curtiss-Wright Export Co.*, 299 U.S. 304, 315–18 (1936).

The precedents for this type of legislation have focused on providing for settlement of private claims against a foreign government, while government-to-government claims have been settled directly. *See* the International Claims Settlement Act of 1949, as amended, 22 U.S.C. § 1621 *et seq.* There is no reason, however, why the legislation has to be so limited. As discussed below, vesting for the benefit of either

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of private property since the November 14 order only permits the Secretary of the Treasury to block Iranian government property. Presumably, such action would be necessary pending vesting legislation; otherwise, the property could be withdrawn in the interim. The vesting of private assets presents issues different from those concerning vesting of government assets, as we discuss below.

[2] Vesting property of private Iranian citizens presents constitutional issues which should be examined in detail if there is any intent to act regarding private property. *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481 (1931). *But see Sardino* v. *Federal Reserve Bank*, 361 F.2d 106 (2d Cir. 1966), *cert. denied*, 385 U.S. 898 (1966).

private claimants or the United States government would be consistent with international law.

## III. International Law

### *A. Damages*

The United States has claimed that Iran has flagrantly violated its treaty obligations to the United States including those under the Vienna Conventions on Diplomatic and Consular Relations. Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, and Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820. Breach of an international agreement involves an obligation to make reparation in an adequate form, even when the treaty does not specify damages as a remedy. *E.g., Corfu Channel Case,* 1949 I.C.J. at pp. 23–24.

Self-help is recognized in international law as a method of securing payment for damages. The unquestioned right of a state to protect its nationals in their persons and property while in a foreign country must permit initial seizure and ultimate expropriation of assets if other methods of securing compensation should fail. *E.g., Sardino* v. *Federal Reserve Bank of New York,* 361 F.2d 106 (2d Cir.), *cert. denied,* 385 U.S. 898 (1966).

The United States is now proceeding against Iran in the International Court of Justice. The Court ruled as a preliminary matter on December 15, 1979, that Iran has violated pertinent treaties. It has not yet ruled on the question of damages. In January the United States submitted a Memorial (brief) to the Court seeking a judgment that the United States is "entitled to the payment to it, in its own right and in the exercise of its right of diplomatic protection of its nationals held hostage, of reparation . . . in a sum to be determined by the Court at a subsequent stage of the proceedings." It is likely that the issue of liability will be argued to the Court in the near future and there is every reason to anticipate a favorable judgment on the question. Such a judgment would, of course, lend support to any self-help remedies the United States may seek to apply. If in a subsequent hearing the Court were to find damages in an amount less than that seized by the United States, we might face the issue of whether part of the assets should be returned.

### *B. Reprisal*

Apart from the issue of damages, vesting may be viewed as a reprisal for the continuing violations of international law by Iran and thus as an element of our diplomatic efforts to end those violations. A. David, The Strategy of Treaty Termination: Lawful Breaches and Retaliations 234 (Yale Univ. Press, 1975). Non-forcible reprisals may be used in the case of breach of treaty obligations. *Commentary on Vienna Convention* *on Law of Treaties,* [1966] 2 Y.B. Int'l L. Comm'n 253–54. Since other means of settling the dispute have failed, and since we can argue that seizure is reasonably proportional to the injury suffered, this action can be justified as meeting the standards of customary international law. *E.g.,* 12 M. Whiteman, Digest of Int'l Law 321–28. We take no position on whether vesting will be an effective method of resolving the diplomatic impasse.

## IV. Effect of Vesting on Pending Litigation

### *A. Domestic Litigation*

What effect would a vesting of Iranian government-owned assets have on domestic suits—and especially on pre-judgment attachments which have been attempted by American creditors, primarily by American banks who have in their custody Iranian government deposits?

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602, deals comprehensively with the suability of foreign states and their agencies and instrumentalities, and defines the circumstances under which property of such entities can be attached prior to judgment and levied upon in satisfaction of judgments. Whether a suit is properly brought and whether an attachment is valid is, therefore, a question of federal law; state law is relevant only in those instances where attachment is authorized under the Immunities Act; state law defines the rights obtained by an attachment creditor.[3]

Vesting of Iranian government-owned assets would have little effect on pending *suits.* It would be for the courts to determine on a case-by-case basis whether the Immunities Act confers jurisdiction. Vesting, however, would impact upon the pending pre-judgment attachments.

A majority of the attachments which have been sought are in all likelihood invalid because they either seek to reach property of the Iranian government not used for a "commercial purpose," or because the property sought to be reached belongs to an Iranian entity which is distinct from the debtor entity. An American claimant who attempted an unauthorized attachment would not be deprived of any cognizable property interests if the asset is vested and title passes to the United States.

In instances where attachments are proper under the Immunities Act, their legal effect would have to be determined under state law. A valid attachment would not be cancelled or annulled upon vesting, even if the property were "frozen" at the time the attachment was obtained. ***Zittman*** v. ***McGrath,*** 341 U.S. 446 (1951) (holding that a "right, title and interest" vesting leaves undisturbed any property interests acquired by a pre-vesting attachment creditor). When vesting property, the federal government merely steps into the shoes of the pre-vesting owner (here, the Iranian government). This does not mean that property in which an attachment creditor obtained an interest under state law is not subject to vesting. The Second *Zittman* case (*Zittman* v. *McGrath*, 341 U.S. 471 (1951)) teaches that the federal government may enforce a transfer of possession of the funds "for purposes of administration." During such administration—which is akin to a receivership—the preexisting rights of attachment creditors must be preserved. State law would determine whether an attachment creditor would be entitled to a preference if the assets of the pre-vesting owner turn out to be insufficient to satisfy the obligation owed to the creditor.

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[3] The Iranian Assets Control Regulations expressly authorize pre-judgment attachments. 31 C.F.R. § 535.418 (as added on December 19, 1979). But the regulations authorize such attachment only where federal or state law grants a right to a creditor to attach his debtor's property; the regulations themselves are not a source of substantive creditor's rights.

### *B. Effect on Foreign Litigation*

Legislation authorizing the vesting of Iranian property would, under principles of international law, not be enforceable against property located abroad.[4] Iranian dollar deposits in U.S. branch banks abroad could be reached only if the foreign courts were to hold that such dollar deposits in U.S. branch banks are in reality located at the home office of the banks in the United States. Of course, that issue is presently being litigated in English and French courts with respect to the Presidential freeze order.

While authorizing vesting of domestic assets, Congress could confirm the preexisting Presidential freezing order on Iranian government-owned assets in the custody of American nationals abroad, in which case the pending litigation in England and France would continue. Congress could, in the alternative, lift the freeze on Iranian assets held by Americans abroad, thus mooting the litigation (as far as the extraterritorial reach of the Presidential freezing order is concerned).

JOHN M. HARMON
*Assistant Attorney General*
*Office of Legal Counsel*

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[4] *See Ingenohl* v. *Olsen*, 273 U.S. 541, 544 (1927): "If the Alien Property Custodian purported to convey rights in English territory valid as against those whom the English law protects he exceeded the powers that were or could be given to him by the United States." Attempts by states to extend their seizure powers extraterritorially have failed. *See, e.g., Republic of Iraq* v. *First National City Bank*, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966).

# Presidential Power to Expel Diplomatic Personnel from the United States

**The President has inherent constitutional power to declare foreign diplomatic personnel *persona non grata* and to expel them forcibly from the United States; the exercise of this power is consistent with international law, including specifically the Vienna Convention on Diplomatic Relations.**

**Inherent in the President's power to recognize foreign countries and their ministers is implied power over the physical premises of diplomatic properties, including power to take actions necessary to protect embassies from damage, and to deny possession to or to eject those not recognized as diplomatic personnel of the sending state.**

**A foreign diplomat who has been declared *persona non grata* and ordered to leave the country does not lose his diplomatic status, and thus should not be able to assert any legal entitlement to remain in the United States under the Immigration and Nationality Act; nor should such an individual be able to frustrate or delay execution of an expulsion order by renouncing his diplomatic status. The Secretary of State may revoke the visas of diplomats declared *persona non grata* to forestall their invocation of the INA as a basis for challenging the President's expulsion order.**

**Federal law enforcement officials, particularly the Secret Service, have authority to protect Iranian diplomatic property against third parties, including any persons not currently recognized by the United States as accredited diplomatic personnel. The President is authorized to call on the full range of his resources in the Executive Branch, including the military, and also on the resources of state or local law enforcement agencies, to carry out an expulsion order in this situation.**

**The Due Process Clause of the Fifth Amendment at most requires only a determination that a diplomat about to be expelled from the United States pursuant to the President's order is in fact the person ordered to be expelled; an expulsion order is arguably subject to judicial review, on a writ of habeas corpus, but only on the limited grounds of mistaken identity.**

**April 4, 1980**

## MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL AND THE ASSOCIATE ATTORNEY GENERAL

This responds to your joint request for our views regarding the authority of the President to expel foreign diplomatic personnel from the United States, to maintain control over the premises of Iranian diplomatic property in connection with that expulsion, and the legal constraints placed on that authority by international and domestic law and by our Constitution. For the reasons stated hereafter, we believe that the President has the authority to declare a nonresident alien who is a member of the staff of a foreign diplomatic or consular post in the United States to be *persona non grata,* forcibly to expel such diplomatic personnel from the United States within a reasonable period of time (as set by the President) after being declared *persona non grata*, and to take all steps reasonably designed to secure all Iranian diplomatic properties and limit their use to diplomatic activities conducted by a third nation acceptable to the President. We conclude that the exercise of this power over diplomatic personnel is not constrained by the Immigration and Nationality Act of 1952, and that the Constitution requires only that a procedure reasonably calculated to insure that personnel actually expelled are those previously declared *persona non grata* be utilized.

We also conclude that prior to their expulsion, diplomatic personnel are not entitled as a matter of law to assert any federal statutory right to remain in this country as a means of avoiding their expulsion.[1] Finally, we believe that judicial review of any actions taken by the President related to expulsion would be limited to possible inquiry by habeas corpus into the question whether a particular person to be expelled was in fact previously declared *persona non grata*.[2]

## I. Presidential Authority Over Diplomatic Personnel and Property

The President's authority over foreign diplomatic personnel derives from his power, under Article II, § 3 of the Constitution, to "receive Ambassadors and other Public Ministers." This provision is the basis of the President's power to grant or withdraw recognition to foreign governments and their ministers, a power regarded as textually committed to the Executive alone. See *Jones* v. *United States*, 137 U.S. 202, 212 (1890); *Baker* v. *Carr*, 369 U.S. 186, 212-13 (1962).[3] The President's power to accept or reject a particular envoy has been beyond serious question since President Washington demanded the recall of Citizen Genet, the French Minister. In 1855, the Attorney General took the position that this right of reception, and therefore rejection, extends to "all possible diplomatic agents which any foreign power may accredit to the United States." 7 Op. Att'y Gen. 186, 209 (1855); 5 Moore, International Law Digest 15-19 (1906). It is recognized that the power to receive Ambassadors is a discretionary one which necessarily includes the right to refuse to receive them, to require their departure, and to determine their eligibility under our laws. 4 Moore, International Law Digest 473-548 (1906).

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[1] A separate international legal question would be raised in the event of a claim of political asylum by one of the individuals whose departure is ordered. The United States is a party to the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. 6577. This Protocol obliges us not to expel or return a refugee to a territory where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. The Protocol defines "refugee" as a person who, owing to well-founded fear of such persecution, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

There is no exception provided in the Protocol with respect to diplomatic and consular personnel and, in practice, such personnel have been accorded the benefits of the Convention.

It would seem unlikely that any Iranian diplomatic or consular personnel who remain officials of the present government of Iran, more than one year after its establishment, would have a reasonable fear of persecution by that government. Nevertheless, such claims are possible, and the United States should have a procedure for assuring that expulsion will not violate our treaty obligations under the Refugee Protocol. A possible approach to this problem is described in Part III of this memorandum.

[2] We note that the analytical basis for the conclusions set forth above and the reasoning set forth below is drawn to a great extent from a series of memoranda from this Office to the Attorney General dating from November of 1979. We would also note that we use the terms diplomatic personnel and diplomatic property herein to include both diplomatic and consular personnel and property; for our purposes, legal distinctions among these classes are either irrelevant or specifically noted.

[3] *See generally* 2 B. Schwartz, The Powers of the President 104–09 (1963).

The President's power to receive and expel foreign diplomatic personnel is a power recognized to inhere in all sovereign nations by the 1961 Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502. The President's power over diplomatic property is a concomitant of his power over diplomatic personnel to the extent that its exercise relates to his recognition power and his power over the conduct of our foreign relations and is likewise recognized by the Vienna Convention. Under Article 22 of the Vienna Convention, this country has a duty to take "all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission." Article 45 of the Convention requires the receiving state to "respect and protect the premises of the mission, together with its property and archives," and authorizes the sending state to entrust custody of the premises to a third state acceptable to the receiving state where the receiving state orders the recall of diplomatic personnel.

Because diplomats and consuls who have been ordered to leave the United States have always complied, the President's authority to order their departure and to enforce such orders has never been subject to judicial challenge. However, individuals have from time to time claimed diplomatic status and have asserted a resulting entitlement to immunity from judicial process. In these cases the courts have consistently acknowledged that determinations as to whether an individual was recognized by the United States as a representative of a foreign government were properly within the province of the Executive. Accordingly, the courts have held that certifications by the Department of State are conclusive as to the status, privileges, and immunities of foreign diplomatic personnel. *In re Baiz,* 135 U.S. 403 (1890); *Carrera* v. *Carrera,* 174 F.2d 496, 497 (D.C. Cir. 1949). As discussed below, we believe an executive determination that an individual previously recognized as a diplomatic or consular representative had been declared *persona non grata* and was required to depart from the United States would be entitled to the same judicial deference under the rationale of these decisions. See *Adams* v. *Vance,* 570 F.2d 950 (D.C. Cir. 1978).

## II. Legal Constraints on the Exercise of the President's Authority

We have identified three types of authority which inform and potentially constrain the President's exercise of his authority to declare *persona non grata* and to expel foreign diplomatic personnel other than personnel accredited to the United Nations and to regulate the use of diplomatic property.[4] The first and most directly relevant authority is international law, specifically the Vienna Convention on Diplomatic Relations. The second is federal statutory law, including the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101 *et seq.* The third is the Due Process Clause of the Fifth Amendment of the Constitution. We will discuss each of these in turn.

### *A. International Law*

#### 1. Diplomatic personnel

Under international law it has long been recognized that every sovereign nation has the right to determine whether it will receive a diplomatic envoy from another nation and whether it will continue to receive and conduct official business with an envoy who has been accepted.[5] This right is reflected in Article 9 of the 1961 Vienna Convention on Diplomatic Relations, a codification in most material respects of prevailing customary international law on this subject. Article 9 provides that the receiving state may, at any time and without having to explain its decision, notify the sending state that any diplomatic officer is *persona non grata* or that a nondiplomatic staff member is no longer "acceptable." Following this determination, the sending state must either recall the person concerned or, "as appropriate," terminate that person's functions at the mission.[6]

Once declared *persona non grata,* foreign diplomatic personnel do not automatically lose their diplomatic status or the diplomatic immunities to which they are entitled under international law. Under ¶ 2 of Article 9 of the Convention, if the sending state "refuses or fails within a reasonable period to carry out its obligations" to recall or terminate the services of a diplomat declared *persona non grata,* "the receiving State *may* refuse to recognize the person concerned as a member of the mission." (Emphasis added.) You have asked us whether this remedy spelled out in Article 9, permitting the United States to strip diplomatic personnel of their diplomatic status if they have not left this country after a reasonable period of time[7] subsequent to their being declared *persona non grata* is, in effect, the exclusive remedy of the President to enforce Article 9. Stated another way, the question is whether, consistent with the Vienna Convention, the President through his agents may forcibly expel foreign diplomatic personnel from the United States subsequent to their being declared *persona non grata.* We believe that, consistent with the Vienna Convention, the President may do so.

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[4] As indicated below, the President's power to compel the departure of diplomats accredited to the United Nations has been, subsequent to the ratification by the Senate of the Convention on the Privileges and Immunities of the United Nations in 1970, essentially the same as his power to expel diplomatic personnel accredited to this country. This Office currently has under consideration at the request of the Legal Adviser of the Department of State the question whether diplomats accredited to the United Nations enjoy the same immunity from application of paragraphs (27) and (29) of 8 U.S.C. § 1182(a) to their entering this country as diplomatic personnel accredited to the United States possess by virtue of 8 U.S.C. § 1102.

[5] E. Denza, Diplomatic Law 40 (1976) [hereafter Denza].

[6] The records of the International Law Commission reflect that the termination of functions option is intended to apply primarily to persons who are nationals of or permanently resident in the receiving state.

It has long been customary for the sending states to withdraw diplomats voluntarily when those diplomats have been declared *persona non grata.* Thus, as indicated above, in American practice it has apparently never been necessary forcibly to expel such a diplomat. Although the Vienna Convention is silent on the question of the right of the receiving state forcibly to expel a diplomat after declaring him *persona non grata,* there is support in both customary practice and in the negotiating record of the Convention for the taking of this action by the receiving state following that determination. One authority cites the fact that the early cases reflecting this practice "are all described as cases of 'expulsion.' " [8] This authority comments further that the practice of requesting recall replaced expulsions "in the more placid political climate of the nineteenth century." [9]

We believe that this history suggests why the Vienna Convention itself does not specifically spell out the right of a receiving state forcibly to expel a diplomat. We would add that ¶ 2 of Article 9, read literally, does not purport either to require the receiving state to strip a foreign diplomat of his diplomatic status in this situation or suggest that remedy is the receiving state's exclusive remedy to deal with a situation in which the sending state has not fulfilled its clear obligation under Article 9 to withdraw its diplomat or to itself terminate the person's diplomatic status. Nothing in logic supports the proposition that we should assume the right to expel was abandoned as a matter of customary international law even though it was not specifically spelled out in the Vienna Convention.[10] In this connection, we note that the preamble to the Convention affirms "that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention." The Vienna Convention, by remaining silent on the question of expulsion, in no way precludes a receiving state from taking this action.

The position of the United States delegation to the United Nations Conference which drafted the Convention reflects the understanding of the U.S. government that a receiving state may require the departure of a member of the diplomatic mission. In commenting on the question of allowing a "reasonable period" in which the sending state must act following a *persona non grata* determination, the delegation stated: "[I]n aggravating circumstances, or where national security is involved, the receiving State may demand his [the diplomat's] immediate *departure*. . . ." (Emphasis added.)

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[7] The drafting history of Article 9 of the Convention indicates that the "reasonableness" of the period following a *persona non grata* action is largely dependent on the attendant circumstances. These circumstances may be such as to warrant the receiving state's demand for immediate action.

[8] Denza, at 40.

[9] *Id.*, at 41.

[10] *Id.*, at 135–36.

Further evidence of the United States' interpretation of customary international law and the practice of the government with respect to the expulsion of diplomats is found in the testimony of Department of State Legal Adviser Leonard Meeker before the Senate Foreign Relations Committee which considered proposed ratification of the Vienna Convention in 1965. Referring to the provision of the Convention (Article 41) which requires persons enjoying diplomatic privileges and immunities to respect the law of the receiving state, the Legal Adviser stated: "[I]f the situation becomes serious enough, we would have to in certain cases perhaps require the departure of members of the diplomatic missions *as we have a right to require and will have that right under the Convention, just as we do now.*"[11] (Emphasis added.)

Since 1965, the government has publicly voiced its views concerning the right to expel diplomats. For example, in its report issued regarding the ratification of the Convention on the Privileges and Immunities of the United Nations, the Senate Committee on Foreign Relations paid special attention to several reservations to the proposed Convention, one of which stated that:

> Persons who are entitled to diplomatic privileges and immunities under the Convention shall not be required to leave the United States otherwise than in accordance with the customary procedure applicable to members of diplomatic missions accredited or notified to the United States.

Ex. Rep. No. 17, 91st Cong., 2nd Sess. 5 (1970).

On its face, this reservation clearly assumes the existence of a nonstatutory, presidentially controlled and supervised procedure for the expulsion of foreign diplomatic personnel. More importantly for present purposes, the Senate Committee went on to state in its report:

> As a final recourse, under the proposed reservation and present law, the United States can compel the departure from its territory of anyone declared *persona non grata* . . . .[12]

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[11] Exec. H. 88th Cong., 1st Sess. 9 (1965).

[12] We note that in the report to the President from the Secretary of State of November 6, 1969, recommending transmittal of the Convention to the Senate for advice and consent to ratification, the terms "compel" and "departure," "expulsion" and "expelled" are used interchangeably. Furthermore, that report contains no reference whatsoever to the Immigration and Nationality Act, which was apparently assumed not to apply to this issue at all.

Thus, it is unquestioned that the United States has traditionally maintained, and continues to maintain, the legal position consistent with prevailing rules of international law and practice and the Vienna Convention on Diplomatic Relations, that the receiving state has the right to require the departure, following *persona non grata* action, of alien nonresident members of the staff of a diplomatic mission.[13]

An argument that a diplomat may not be forcibly expelled by a receiving state could be made based on the principle articulated in Article 29 of the Vienna Convention that the "person of a diplomatic agent shall be inviolable" and that such a person "shall not be liable to any form of arrest or detention." We are not persuaded by that argument for several reasons. First, these provisions of Article 29 cannot and have not been read to mean that a diplomat's movement is not subject to any control, *see* Article 26 of the Vienna Convention, or that he cannot be prevented from taking action which violates the domestic law of the receiving state. [1957] 2 Y.B. Int'l L. Comm'n. 138.[14] For example, the Department of State has taken the position that foreign diplomats may be escorted off the New Jersey Turnpike when found to be speeding, even though they were clearly not subject to arrest for that offense.[15] We assume there would be no doubt that a foreign diplomat could be physically restrained from committing an assault on the streets of Washington, D.C., even though once again not subject to arrest for that assault, and that action could be taken without raising any substantial question under the Vienna Convention. In our view, an order of the President declaring foreign diplomats *persona non grata* with an accompanying order to depart the United States constitutes a legal determination under United States law that may be enforced in similar fashion so long as the foreign diplomat affected is treated "with due respect" as provided in Article 29.[16]

Under the analysis above, we believe the President has the constitutional power forcibly to eject diplomatic personnel declared by him to be *persona non grata* from the United States and that the exercise of that power would be consistent with international law.

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[13] International law with respect to the treatment of consular officers and consular staff parallels that with respect to diplomats; Article 23 of the Vienna Convention on Consular Relations contains language nearly identical to that of paragraphs 1 and 2 of Article 9 of the Vienna Convention on Diplomatic Relations. Under this Article the receiving state may declare a consular officer *persona non grata* or a staff member unacceptable and may withdraw recognition or cease to consider the person as a member of the consulate if the sending state refuses to recall the person or terminate his functions "within a reasonable time." The official records of the UN Conference which adopted this article clearly reflect the intention to prescribe rules relating to the determination that a member of a consulate is *persona non grata* or no longer acceptable which are virtually the same as those relating to members of a diplomatic mission. The conferees specifically rejected proposals which would place consular personnel in a more advantaged position vis-a-vis diplomatic personnel. Thus, we conclude that consular personnel may similarly be required to depart the receiving state following *persona non grata* action. I Official Records UN Conference on Consular Relations 209–217.

[14] *Id., at 136.*

[15] *Hearings on Exec. H. Before a Subcommittee of the Senate Committee on Foreign Relations* 20 (1965) (drunk diplomat could be "haul[ed] off by the scruff of his neck").

[16] We believe the phrase "due respect" must be read to authorize the use of the minimum level of force necessary to deal with any resistance by diplomatic personnel to their expulsion. Likewise, that phrase in no way precludes personnel enforcing a presidential order from using reasonable force to defend themselves from violent acts against their persons.

2. Diplomatic property

The President has sole power to recognize foreign countries and to determine the acceptability of their ministers; inherent in this authority is the implied power to control physical access to embassy premises in the United States. This includes the power to take necessary action to protect embassies from damage, and the power to deny possession to or eject those not recognized as diplomatic personnel of the sending state.

As with the expulsion of diplomatic personnel, an argument can be made that the President's power over the physical premises of diplomatic properties is limited by the principle set forth in Article 22 of the Convention that the premises of an embassy are "inviolable." This principle of inviolability is generally taken to mean that agents of the United States may not enter without consent of the head of the mission. At the same time, Article 22 imposes a duty on the receiving state to take "all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission."

Article 45 of the Convention, however, modifies these commands somewhat in cases where, as here, the diplomatic personnel are temporarily recalled. It requires the receiving state to "respect and protect the premises of the mission, together with its property and archives," and authorizes the sending state to trust custody of the premises to a third state acceptable to the receiving state.

It is plain from the background of the Convention that the duty in Article 45 to "respect and protect the premises" does not mean full inviolability. Denza, *supra,* at 281. Although it is not clear when inviolability ends, analogy to our discussion above of Article 29 regarding termination of personal immunity suggests that inviolability should continue for a reasonable time after the premises cease to be used for diplomatic purposes. In turn, this suggests that if the premises are used for purposes incompatible with a diplomatic mission, such as an armed occupation, inviolability should cease at that point. In view of this, the Convention's provisions in Articles 22 and 45 protecting the integrity of the embassy premises suggest ample authority to control access to diplomatic property in these circumstances.

***B. Federal Statutory Law***

1. Diplomatic personnel

The President's exclusive power over foreign diplomatic personnel as a matter of domestic law is explicitly and implicitly recognized in the statute most directly relevant to the issues at hand, the Immigration and Nationality Act of 1952. Under § 102 of that Act, 8 U.S.C. § 1102, diplomatic personnel are generally exempt from the provisions of the Act "relating to ineligibility to receive visas and the exclusion or deportation of aliens." The legislative history of § 102 indicates clearly that the Congress, in leaving these matters to the President, was simply recognizing the constitutional limitations on its ability to control or regulate the President's constitutional power to receive (and expel) the foreign representatives of countries with whom we have diplomatic relations. *See* H.R. Rep. No. 1365, 82nd Cong., 2nd Sess. 34 (1952).

We believe this congressional recognition of the President's exclusive power to deal with foreign diplomatic personnel is relevant to a determination of the extent to which foreign diplomatic personnel, between the time they are declared *persona non grata* and the time they depart the United States or are forcibly expelled from the United States, may assert some legal entitlement to remain in the United States under the Immigration and Nationality Act. We do not believe they have any such entitlement during that period.

Both immigrant and nonimmigrant aliens, whether in this country legally or illegally, are generally entitled to claim various rights to remain in this country should it otherwise be determined that they are deportable. Indeed, § 241(e) of the Immigration and Nationality Act, 8 U.S.C. § 1251(e), recognizes that diplomatic personnel who fail to maintain their status as diplomatic personnel may not, when they lose their status, be required by the Attorney General to depart the United States without the approval of the Secretary of State except under certain limited circumstances. Thus, the Immigration and Nationality Act recognized that diplomatic personnel may lose their status and, in doing so, become legally entitled to assert other rights to remain in the United States. The question, however, is whether diplomatic personnel, so long as they are deemed by the President to retain that status, may claim statutory entitlements to remain in this country after they have been declared *persona non grata* and ordered to depart the United States.

In addressing this issue, we would first note that a construction of the Immigration and Nationality Act which would permit foreign diplomatic personnel having been declared *persona non grata* and ordered to leave the country to assert other legal rights to remain in this country and therefore, by virtue of the process to which they would be entitled, at the very least substantially delay their departure, would directly impinge on the President's power under the Constitution to deal with diplomats and to conduct our foreign relations. Particularly where the order for foreign diplomatic personnel to depart is directly related to the conduct of important foreign relations, which it clearly would be with regard to Iranian diplomatic personnel, we believe there would be a strong presumption against implying that Congress, by statute, gave such diplomatic personnel the means to frustrate a decision by the President. *Cf. Narenji* v. *Civiletti*, 617 F.2d 745 (D.C. Cir. 1979) *cert. denied*, 446 U.S. 957 (1980). Generally, statutes should not be read to conflict with the Constitution, *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932), treaties, *United States* v. *Lee Yen Tai*, 185 U.S. 213, 221-22 (1902), or the law of nations, *Lauritzen* v. *Larsen*, 345 U.S. 571, 578 (1953).

As indicated above, § 102 of the Act, 8 U.S.C. § 1102, generally sets foreign diplomatic personnel apart from other classes of nonimmigrants for purposes of the Act. There would appear to be no judicial precedent regarding what rights foreign diplomatic personnel might have to interpose legal objections based on federal substantive law to their being expelled from the country on order of the President. One line of authority, however, dealing with persons paroled into this country pursuant to § 212(d)(5) of the Act, 8 U.S.C. § 1182(d)(5), supports our conclusion that foreign diplomatic personnel should be viewed as having no such rights.

Under § 212(d)(5), the Attorney General is authorized to parole aliens into the United States under certain circumstances. Notwithstanding the fact that such parolees are physically within the United States, the Supreme Court has held that they are not entitled to assert any legal entitlement to remain in the country beyond the terms upon which they were paroled into the country even though, as a factual matter, they might otherwise qualify under the Immigration and Nationality Act to remain in the United States or at least to receive the Attorney General's consideration of their claim to legal entitlement to remain in the United States. *See Leng May Ma* v. *Barber*, 357 U.S. 185 (1958).

Although parolees, unlike foreign diplomatic personnel, do not technically have "nonimmigrant" status, both classes of persons are physically present in this country. In the case of parolees, the courts have determined that they have no entitlement to assert any legal right to remain in the country because they have not "entered" the country even though, as indicated above, they may be physically present not only at the border but indeed within the interior of the United States. A district court has summed up this concept of entry by stating that entry "means freedom from governmental restraint . . . ," *Klapholz* v. *Esperdy*, 201 F. Supp. 294, 297 (S.D. N.Y. 1961). These cases clearly establish the proposition that the Constitution does not itself affect the power of the Congress or the President to effect the removal of some classes of persons within our physical borders summarily.

In short, we do not believe that foreign diplomatic personnel have any statutory right to assert any legal entitlement to remain in the United States once they have been declared *persona non grata* and have been ordered to leave the country. This reading of the Immigration and Nationality Act is consistent with and supported by the doctrine, discussed *supra*, that statutes should be construed to avoid raising doubts as to their constitutionality, *Crowell* v. *Benson, supra; Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973). It is also consistent with the most recent expression by the Senate touching on this issue.

In its report regarding the ratification of the Convention on the Privileges and Immunities of the United Nations, the Senate Committee on Foreign Relations paid special attention to several reservations to the proposed Convention, one of which stated:

> Persons who are entitled to diplomatic privileges and immunities under the Convention shall not be required to leave the United States otherwise than in accordance with the customary procedure applicable to members of diplomatic missions accredited or notified to the United States.

Ex. Rep. No. 17, 91st Cong., 2nd Sess. 5 (1970). On its face, this reservation clearly assumes the existence of a nonstatutory, presidentially controlled and supervised procedure for the expulsion of foreign diplomatic personnel. More importantly, for present purposes, the Senate Committee went on to state in its report (*id.*):

> As a final recourse, under the proposed reservation and present law, the United States can compel the departure from its territory of anyone declared *persona non grata*. . . .

A separate question arises whether a foreign diplomat having been declared *persona non grata* and ordered to leave the United States could frustrate or delay the execution of that order either by himself renouncing his status as a foreign diplomat or having his diplomatic credentials revoked by his government. Although the issue is not free from doubt, we believe that neither the individual act of a foreign diplomat nor an act of the sending state which would substantially undermine the foreign policy objective of the President should be permitted to do so. Thus, were the President to determine that the quick and sure expulsion of an identified group of foreign diplomats would significantly advance the foreign policy interests of the United States, we would not read either international law, *i.e.*, the Vienna Convention, or domestic law, *i.e.*, the Immigration and Nationality Act of 1952, as permitting the frustration of that foreign policy objective and the President's constitutional authority to carry it out. Under Article 9 of the Convention, failure of the sending state to withdraw its diplomatic personnel in such situations specifically entitles the receiving state to strip the foreign diplomatic personnel involved of their status as diplomats. We see no logical reason to suggest that Article 9 does not implicitly recognize the power of receiving states to take action short of totally withdrawing that status and the immunities that accompany that status. As indicated in Part I of this memorandum, we believe the President constitutionally may do so. In this situation, the status of the diplomatic personnel does not necessarily revert to one of being merely "illegal aliens" in the United States.

This analysis also would apply, we believe, to a situation in which a foreign diplomat, rather than complying with a directive to depart the United States, went into hiding and was later found after the scheduled date for his departure had passed. In such a situation, we see no reason to recognize that act as bringing him within the protection of the Immigration and Nationality Act any more than a similar act committed by a parolee. Whether Congress could constitutionally provide such protections for "ex-diplomats" is a question we need not address; we simply conclude that Congress has expressed no intent in the Immigration and Nationality Act for such foreign diplomats to receive the benefits of the United States domestic law as a result of their defiance of an order issued by the President. Rather, Congress by its silence has left to the President the determination of when, for domestic law purposes, a foreign diplomat may lose that status and secure the benefits of our domestic law.

Notwithstanding the clear constitutional power of the President to receive ambassadors and public ministers, their status as nonimmigrant aliens under the Immigration and Nationality Act may make it prudent for the Executive to take certain actions that might make it more difficult for a recalcitrant Iranian diplomat to challenge successfully the President's decision in a federal court. Certain sections of the Act, particularly §§ 245 and 248, U.S.C. §§ 1255 and 1258 might be invoked as allowing a nonimmigrant to apply, as any other nonimmigrant may apply, to adjust his status or to change his classification. Since those sections entitle an alien "who is continuing to maintain" his nonimmigrant status to make such applications, it would seem prudent for the Executive to use powers conferred by the Immigration and Nationality Act which might forestall this eventuality. Section 221(i) of the Immigration and Nationality Act, 8 U.S.C. § 1201(i), provides that after the issuance of a visa "the Secretary of State may at any time, in his discretion, revoke such visa or other documentation. Notice of such revocation shall be communicated to the Attorney General and such revocation shall invalidate the visa or other documentation from the date of issuance." Thus, if the Secretary revoked the visas of diplomats who were declared *persona non grata,* the effect would be to cancel the diplomat's nonimmigrant status, with the result that his arguable entitlement to adjustment would disappear.

While termination of the status of a diplomat is rare in our practice, this is precisely what was done in 1961 in the case of Miroslav Nacvalac, a member of the Permanent Mission of the Czechoslovak Socialist Republic to the United States. The record indicates that prior to the revocation of Mr. Nacvalac's status under § 101(a)(15)(G) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(G), he had indicated an interest in discussing the possibility of remaining in the United States. In Press Release 421 dated June 21, the Department of State indicated that the effect of the revocation of Mr. Nacvalac's status "is to place [him] in the category of an alien illegally in the United States of America." The press release continued: "Under the laws and regulations of the United States of America, Nacvalac may elect to depart voluntarily or in lieu of such voluntary departure, be removed." A footnote to the press release, which was reprinted in the Department of State Bulletin Vol. XLV, page 67, indicated that Mr. Nacvalac left the United States the next day.

There have been only two decided cases in which a judge has confronted the question of visa revocation by the Secretary of State. In the first case there was no opinion. The second case, which was decided last year, is *Knoetze* v. *United States*, 472. F. Supp. 201 (S.D. Fla. 1979), *aff'd* 634 F.2d 207 (5th Cir.), *cert. denied* 454 U.S. 823 (1981). In that case Judge Rottger of the United States District Court for the Southern District of Florida sustained the Secretary's power to revoke visas. However, in his opinion he expressed concern that, when an alien whose visa was being revoked was in the United States, he did not have an administrative mechanism to insure that a revocation had not been erroneous. To meet this point, we believe that if it is decided for reasons of prudence to revoke visas of certain Iranian diplomats, the Department of State should establish an informal board of review to consider claims that revocation had been based on a mistake of fact.

In summary, we believe that the President has the authority to require the removal from the United States of diplomats declared *persona non grata.* However, we believe that prudence dictates that in certain cases we should revoke the visas of such diplomats in order to forestall invocation of sections of the Immigration and Nationality Act as a basis for challenging the President's decision. We believe that by using the revocation power, the government could demonstrate to a court that an objecting diplomat or consul had no colorable claim for relief under the terms of the Act.

### 2. Diplomatic property

Protection of embassy premises and diplomatic personnel is generally performed by the Secret Service's Uniformed Division under 3 U.S.C. § 202, which provides that, subject to the supervision of the Secretary of the Treasury, the Division shall perform "such duties as the Director, United States Secret Service, may prescribe in connection with the protection of the following . . . (4) foreign diplomatic missions located in the metropolitan area of the District of Columbia; . . . and (8) foreign diplomatic missions located in such areas in the United States, its territories and possessions, as the President, on a case-by-case basis, may direct. The members of such force shall possess privileges and powers similar to those of the members of the Metropolitan Police of the District of Columbia."

This statute first extended protection to diplomatic missions in 1970, in response to concern that the Metropolitan Police were providing inadequate protection against ordinary crime. Pub. L. No. 91-217, 84 Stat. 74. *See generally* S. Rep. No. 659, 91st Cong., 2d Sess. (1970). The extent of the "protection" that may be afforded is otherwise undefined in the legislative history. The ordinary meaning of the term suggests safeguarding the premises against damage or theft, and the personnel against assaults. The duty imposed on the United States by the Vienna Convention to protect mission premises even after the recall of the personnel strongly suggests that the Secret Service's duties do not end with the sealing of a mission. Where recall is temporary, as here, there presumably must be a mission to which the personnel may return when relations improve. Thus, the Service has present duties to protect Iranian diplomatic property against third parties. These duties will extend to the consulates, however, only if the President so directs the Service.

More difficult questions surround the power of the Service regarding nondiplomatic persons who assert the permission of the sending state to enter. Here, because the President has sole power to determine what governments and ministers are to be recognized, we believe there is implied power for the President to direct the Service to forbid access to those not currently recognized as accredited diplomatic personnel to ensure that only those having diplomatic business with the embassy have access to it.

Under 18 U.S.C. § 970, damage or unauthorized occupancy of a diplomatic mission is a crime.[17] This provision, passed in response to terrorism at the Munich Olympics and elsewhere, is part of the "Act for the Prevention and Punishment of Crimes Against Internationally Protected Persons," Pub. L. No. 94-467, 90 Stat. 1997. This statute surely provides authority for measures designed to protect the embassy against entry by anyone who has no permission from the government of Iran. Whether this ban can include those purportedly authorized access by the Iranian government but not recognized as accredited personnel by the United States may be less clear. Section 970 refers to 18 U.S.C. § 1116(b) for its definition of the foreign government whose premises are protected, and includes countries "irrespective of recognition by the United States." The foreign officials entitled to demand that unauthorized persons depart the premises are defined, however, as those "duly notified to the United States as an officer or employee of a foreign government." 18 U.S.C. § 1116(b)(3)(B). Thus, the statute appears not to authorize unaccredited foreign persons to demand the exit of others from diplomatic premises. When the accredited personnel have been expelled, this definition implies added scope to the authority under § 970(b)(2)(D) of "any person present having law enforcement powers" to order departure from the mission as necessary.

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[17] (a) Whoever willfully injures, damages, or destroys, or attempts to injure, damage, or destroy, any property, real or personal, located within the United States and belonging to or utilized or occupied by any foreign government or international organization, by a foreign official or official guest, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

(b) Whoever, willfully with intent to intimidate, coerce, threaten, or harass—

(1) forcibly thrusts any part of himself or any object within or upon that portion of any building or premises located within the United States, which portion is used or occupied for official business or for diplomatic, consular, or residential purposes by—

(A) a foreign government, including such use as a mission to an international organization . . . ;

(2) refuses to depart from such portion of such building or premises after a request—

(A) by an employee of a foreign government or of an international organization, if such employee is authorized to make such request by the senior official of the unit of such government or organization which occupies such portion of such building or premises; . . .

(D) by any person present having law enforcement powers;

shall be fined not more than $500 or imprisoned not more than six months, or both.

This federal statute was not meant to "relieve any person of any obligation imposed by any law of any state, . . . or the District of Columbia." H.R. Rep. No. 1614, 94th Cong., 2d Sess. 8 (1976). Because this statute was explicit in its refusal to preempt local criminal law, the Secret Service and the Metropolitan Police should have powers so conferred available to them. *See Fatemi* v. *United States*, 192 A.2d 525 (D.C. Ct. App. 1963) (holding that Iranian students occupying the embassy against the wishes of the Minister could be convicted of "unlawful entry" under the D.C. Code).

Finally, we believe that the Federal Bureau of Investigation (FBI) may participate in controlling access to diplomatic property under its general enabling authority, 28 U.S.C. § 533:

> The Attorney General may appoint officials—
>
> (1) to detect and prosecute crimes against the United States;
>
> (2) to assist in the protection of the person of the President; and
>
> (3) to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General. . . .

The presence of 18 U.S.C. § 970, making unauthorized entries into diplomatic property a federal crime, is sufficient to invoke FBI jurisdiction under § 533(1).

We would add that because actions taken to carry out the President's order for diplomats to leave this country are incident to an exercise of his constitutional power, they neither rely on statutory authority for direct support nor are subject to the restrictions of the Posse Comitatus

Act, 18 U.S.C. § 1385, which generally restricts the use of Army or Air Force personnel to enforce civilian criminal law. In addition, 18 U.S.C. § 1116(d) specifically permits the use of military personnel from all the Armed Forces to enforce 18 U.S.C. § 970. Thus, we believe that the President is entitled to call on the full range of his resources in the Executive Branch to achieve the objectives discussed herein. In addition, § 1116(d) permits the President to draw on the resources of state or local law enforcement agencies in this situation.

### III. The Due Process Clause of the Fifth Amendment

The final question presented by the expulsion of foreign diplomatic personnel from the country is whether the Due Process Clause of the Fifth Amendment requires that any kind of process be observed prior to their expulsion. This Office has previously taken the position that foreign diplomatic personnel derive their legal rights from their status as diplomats under international law. We believe the Due Process Clause is implicated, if at all, only with regard to the determination whether a person about to be forcibly expelled from the United States pursuant to an order of the President is in fact the person the President ordered to be expelled. Pursuant to our meeting of March 28, 1980, with representatives of the Department of State, we understand that a procedure reasonably calculated to ensure expulsion only of those persons previously ordered to be expelled by the President will be utilized. In these circumstances, we believe that the Due Process Clause, if applicable at all, would be fully satisfied and therefore we pretermit further discussion of that issue.[18]

JOHN M. HARMON
*Assistant Attorney General*
*Office of Legal Counsel*

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[18] An issue related to the question of the applicability of the Constitution to the forcible ejection of a foreign diplomat from the United States is the extent to which the order of the President would be subject to judicial review. Because a foreign diplomat being forcibly ejected would arguably be in the "custody" of the President's agents who were carrying out the President's order to depart, there might be a colorable claim that a writ of habeas corpus pursuant to 28 U.S.C. § 2241(c)(4) would be available. Under our analysis above, we believe that the only claim upon which a writ of habeas corpus could even arguably be granted in this situation would be a claim that the person bringing the action is not in fact the same person as the foreign diplomat ordered to leave the country by the President. As indicated above, a procedure designed reasonably to ensure that such a mistake is not made should reduce litigation risks to the minimum.

# Legality of Certain Nonmilitary Actions Against Iran

Under the International Emergency Economic Powers Act (IEEPA), the President may impose an embargo on all imports from Iran and, subject to certain conditions, a prohibition on exports of food and medicine to Iran. The IEEPA also authorizes him to order the closure of Iranian business offices located in the United States.

While the President may have some statutory and constitutional power to control third party transactions with Iran, particularly those designed to circumvent the impact of sanctions imposed by the United States directly on Iran, his authority to impose a general secondary boycott against those trading with Iran may be limited. It is thus not clear whether, under existing laws and treaties, airlines and shipping companies that serve Iran may be denied landing rights and fuel purchases in the United States.

Presidential action to block international satellite communications from Iran to the United States is clearly authorized only insofar as it is part of a more general ban on transactions with Iran and its nationals.

The President's authority to impose a ban on travel by American citizens to Iran may have a more limited applicability to journalists. *See United States* v. *O'Brien*, 391 U.S.C. 367 (1968). Moreover, restrictions on travel to Iran would have no immediate effect on persons already in that country. However, the IEEPA could be used to impose a broad ban on financial transactions between Americans overseas and Iran or its nationals.

The IEEPA would authorize a broad prohibition against all transactions between Americans relating to Iran, as long as Iran has even an indirect interest in the transaction; however, it is not possible under the IEEPA to reach "purely domestic" transactions.

April 16, 1980

## MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This responds on an urgent basis to your request for our opinion regarding the legality of ten possible nonmilitary actions against Iran, most or all of which would rely on the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701, *et seq.* (Supp. I 1977). We will respond to the proposals in the order in which they have been presented.

### 1. Embargo All Imports From Iran

This action is clearly legal under the IEEPA. The statute explicitly allows the prohibition of transfers in which foreign nationals, as well as foreign governments, have an interest.[1] The pertinent legislative history envisions total trade embargoes, reflecting well-established practice under the IEEPA's predecessor statute, the Trading With the Enemy Act of 1917. *See* H.R. Rep. No. 459, 95th Cong., 1st Sess. (1977) (hereafter "1977 House Report"); S. Rep. No. 466, 95th Cong., 1st Sess. (1977).[2]

### 2. Prohibit Food and Medicine Exports to Iran

The IEEPA also authorizes this action, although it sounds a note of caution. Under § 1702(b) of the Act,

> (b) The authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly—
>
> * * * * *
>
> (2) donations, by persons subject to the jurisdiction of the United States, of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering, except to the extent that the President determines that such donations (A) would seriously impair his ability to deal with any national emergency declared under section 1701 of this title, (B) are in response to coercion against the proposed recipient or donor, or (C) would endanger Armed Forces of the United States which are engaged in hostilities or are in a situation where imminent involvement in hostilities is clearly indicated by the circumstances.

On its face, this provision applies only to donations, not commercial transactions, and even when applicable may be satisfied by a Presidential "determination" under (b)(2)(A) that it would seriously impair the President's ability to deal with the emergency. It is not clear whether this determination is to be the subject of a report to Congress under § 1703 of the Act, although it could easily be included therein. To give maximum effect to the congressional policy found in § 1702(b)(2), an embargo on commercial food and medicine exports could contain an exception in the terms of the statute to allow donations of these items "to relieve human suffering."

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[1] Section 1702(a)(1) reads as follows:

> At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—
> (A) investigate, regulate, or prohibit—
> (i) any transactions in foreign exchange,
> (ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,
> (iii) the importing or exporting of currency or securities; and
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest; by any person, or with respect to any property, subject to the jurisdiction of the United States.

[2] The legislative history of the Export Administration Act of 1979, 50 U.S.C. App. § 2401 *et seq.*, confirms that total trade embargoes are to be accomplished under the IEEPA, rather than by export controls. *See* H.R. Conf. Rep. No. 482, 96th Cong., 1st Sess. 46 (1979).

A separate source of authority to control the export of food, but not medicine, is the Export Administration Act of 1979, 50 U.S.C. App. § 2401 *et seq.* To invoke this statute, no executive order is necessary, although there is a requirement for a report to Congress.[3] Under § 6 of the Act, "the President may prohibit or curtail the exportation of any goods . . . to the extent necessary to further significantly the foreign policy of the United States. . . ." Section 6(f), however, provides that § 6 does not authorize export controls on medicine or medical supplies. (At the same time, it explicitly disclaims any effect on authority under the IEEPA to control these goods.)

Restrictions on food exports are authorized but not favored by the Export Act. Section 6(f) provides that it "is the intent of Congress that the President not impose export controls . . . on any goods . . . if he determines that the principal effect of the export . . . would be to help meet basic human needs." And §§ 2(9) and 3(11) urge him to "minimize" restrictions on the export of agricultural products. Of course, grain shipments to the Soviet Union are currently controlled under this statute.

### 3. Close the New York Offices of Iranian Firms

If Iran Air or another Iranian firm is an "instrumentality" or "controlled entity" of the government of Iran, Executive Order No. 12,170 3 C.F.R. 457 (1979), has already "blocked" all "interests" in it. The Treasury Department has issued Iranian Assets Control Regulations, 31 C.F.R. Part 535, which may be broad enough to allow Treasury to order such offices closed without even amending the regulations.[4] Such an interpretation should not run afoul of the statute, which includes authority in § 1702(a)(1)(B) to "prohibit . . . exercising any right, power, or privilege" with respect to subject property. To the extent there is any doubt whether the current regulations authorize ordering businesses to close, an amendment could assert that authority.

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[3] The substantive and procedural requirements of the pertinent portions of the Export Administration Act are outlined in our memorandum of April 11, 1980, to the Special Assistant to the President for Consumer Affairs. [NOTE:—The cited memorandum is published in this volume at p. 567 *infra.* Ed.]

[4] The operative section of the regulations, § 535.201(a), provides that "no property subject to the jurisdiction of the United States . . . in which . . . Iran has any interest . . . may be transferred . . . or otherwise dealt in except as authorized." The regulations then define "Iran" broadly to include controlled businesses (§ 535.301). "Transfer" is defined broadly enough to include the creation of informal licenses such as those enjoyed by business invitees: "any act or transaction, whether or not evidenced by writing, . . . the . . . effect of which is to create . . . any right . . . privilege, or interest with respect to any property." (§ 535.310) "Interest" is defined to mean "an interest of any nature whatsoever." (§ 535.312)

For those Iranian businesses that are *not* instrumentalities of the government of Iran, an executive order applying the IEEPA to transactions of Iranian nationals could easily have the effect of forcing closure. Indeed, the principal problem here appears to be in avoiding overbroad effects from an order that is designed to reach only some Iranian businesses. For presumably there would be no attempt to block everyday business transactions (such as banking) by Iranian nationals properly present in this country. To avoid undue complexity, an executive order could provide that only firms specifically designated by the Treasury Department would be affected.

### 4. Deny Foreign Airlines That Serve Iran Landing Rights or Fuel Purchases in the United States

This option raises a major unresolved issue under the IEEPA: to what extent may it be used to control foreign countries or nationals that are not the source of the threat that created the emergency? The terms of the statute are broad enough to reach third party conduct, as long as some foreign country or national is involved: § 1702(a)(1)(B) grants the President authority over property in which "any foreign country or a national thereof has any interest." There must also be involved "any person" or "any property" that is subject to the jurisdiction of the United States. Our national jurisdiction is generally held to extend to our citizens, wherever found, and to anyone else found within American territory. *See generally* Restatement (Second), Foreign Relations Law of the United States, § 10 (1965).

These provisions of § 1702(a) suggest the presence of authority to control at least some third country transactions that are subject to our jurisdiction. Such a reading would reflect the obviously broad phraseology of the IEEPA, and would help to forestall simple circumventions of the statute by resort to agency relationships. Moreover, this interpretation would respect a principal limit to presidential discretion imposed by Congress in drafting the IEEPA: denial of authority to regulate "purely domestic" transactions. 1977 House Report, *supra*, at 11.

Nevertheless, persuasive arguments that the IEEPA should be available to control third country transactions that are designed to circumvent its direct impact do not justify regulating other third country transactions as part of a general "secondary boycott." Although the IEEPA and its predecessor statute have long been used to embargo trade with offending nations, we know of no instance of a secondary boycott, nor of any particular support for one in the legislative history. It seems clear, however, that the President could find that a foreign carrier's providing air service to Iran poses an unusual threat to the foreign policy of the United States and that all transactions with that carrier should be prohibited.

It may also be possible for the President to draw authority for an action designed to free the hostages, such as a secondary boycott, from the provisions of an 1868 statute, now 22 U.S.C. § 1732:

> Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.

We are unaware of any instances in which this provision has been invoked. It was passed in response to a dispute with Great Britain after the Civil War, in which that nation was trying its former subjects, who had become naturalized Americans, for treason. The House version of the bill, which would have authorized the President to suspend all commerce with the offending nation and to round up its citizens found in this country as hostages, was replaced by the present language which was in the Senate bill. Cong. Globe, 40th Cong., 2d Sess. 4205, 4445–46 (1868). It is not clear whether this change was meant to restrict the President to measures less drastic than those specified in the House bill. It is also not clear what Congress meant by the phrase "not amounting to acts of war." At least Congress did not seem to be attempting to limit the President's constitutional powers.

To the foregoing statutory sources of presidential authority must be added his broad constitutional power in foreign affairs. *See generally United States* v. *Curtiss-Wright Export Corp.,* 299 U.S. 304 (1936). The President should be able to take actions in foreign affairs for which Congress has not explicitly denied him authority. *See Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring). A secondary boycott against those trading with Iran, ordered to help free the hostages in Tehran, should be within the broad constitutional powers of the President, since the statutes do not explicitly deny him such power—indeed, 22 U.S.C. § 1732 provides him some general support in this particular situation.

There may, however, be limitations on presidential power in applicable aviation agreements with particular countries. The terms by which we grant foreign airlines the right to provide scheduled service here are set out in bilateral agreements with individual countries. We understand from the State Department that these agreements do not provide for suspension in the present circumstances. (An examination of each bilateral treaty and its amendments would be necessary to verify this for all countries that may be involved. Until that review occurs, we cannot recommend this action.)

The Chicago Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295, 356, includes a provision that in case of war or national emergency the provisions of the Convention "shall not affect the freedom of action" of parties to the Convention (Art. 89). That Convention, however, only gives parties the privilege of making overflights and technical stops for non-scheduled flights. Art. 5. The International Air Services Transit Agreement, Dec. 7, 1944, 59 Stat. 1693, E.A.S. No. 487, 84 U.N.T.S. 389, confers similar privileges for scheduled airlines, and incorporates the provisions of the Chicago Convention (Section 2). The bilateral agreements do not, by their terms, however, incorporate the Chicago Convention provision; they are essentially self-contained agreements.[5]

### 5. Deny Vessels or Companies Serving Iran Access to U.S. Ports or Fueling Facilities

See the analysis above under option 4 for our views on general presidential authority for this. We have not yet had an opportunity to consider the possible effect of the maritime statutes.

### 6. Block International Satellite Communications From Iran to the U.S. at Satellite Ground Stations in the U.S.

The President may have statutory authority to block international satellite communications between Iran and the United States. Under 47 U.S.C. § 721(a), the President is authorized to:

> (4) exercise such supervision over relationships of [COMSAT] with foreign governments or entities or with international bodies as may be appropriate to assure that such relationships shall be consistent with the national interest and foreign policy of the United States.

The purpose of this provision appears to have been to prevent COMSAT from affecting U.S. foreign policy in its contractual arrangements, not to authorize the President to control the substance of its communications. *See* 108 Cong. Rec. 16,603–05 (1962). Thus, the COMSAT statute may provide useful support for an action that is part of a broader foreign policy purpose of severing transactions with Iran.

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[5] The Joint Statement on International Terrorism at the Bonn Conference may provide some basis for calling on the signatories of the Bonn Conference not to serve Iran because, according to the State Department, Iran is presently harboring two international aircraft hijackers.

It would not support actions directed to the content of particular transmissions.

Section 1702(b) of the IEEPA provides that:

> The authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly—
>
> (1) any postal, telegraphic, telephonic, or other personal communication, which does not involve a transfer of anything of value. . . .

On its face, this provision goes no further than to deny the President any authority under the IEEPA, without reference to powers he may possess otherwise. The House report emphasizes that it did "not intend . . . to authorize regulation or prohibition of the collection and dissemination of news." 1977 House Report at 15. This reflects an underlying constitutional concern:

> [W]hile it should be the purpose of the legislation to authorize tight controls in time of national emergency, these controls should not extend to the total isolation of the people of the United States from the people of any other country. Such isolation is not only unwise from a foreign policy standpoint, but enforcement of such isolation can also entail violation of First Amendment rights of freedom of expression if it includes, for example, prohibitions on exchange of printed matter, or on humanitarian contributions as an expression of religious convictions.

*Id.* at 11.

We are constrained to take a cautious view of statutory authority for this presidential option because of the Supreme Court's emphasis on the need for clear statutory authority for executive action significantly affecting constitutional liberties. *See Kent* v. *Dulles,* 357 U.S. 116, 129 (1958). Thus, we do not regard either the COMSAT statute or 22 U.S.C. § 1732 as sufficiently clear warrant for presidential action directed at satellite communications themselves, and not part of a broader restriction. Nor does a more limited ban on commercial transmissions commend itself. Distinctions between these communications and news or personal communications are tricky at best, and even commercial speech now enjoys some constitutional protection. *See generally Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976).

The First Amendment issue can take either of two forms. Any presidential action that constitutes a direct restraint on the content of speech must meet a very high standard of review. The government must show a "compelling interest," a close logical nexus between that interest and the restriction, and a narrow tailoring of the restriction to avoid overbreadth. *See, e.g., Police Department of the City of Chicago* v. *Mosley,* 408 U.S. 92, 95–96 (1972). And if the scheme involves a prior restraint by licensing particular communications, it bears "a heavy presumption against its constitutional validity," *New York Times Co.* v. *United States,* 403 U.S. 713, 714 (1971). In the abstract, it is difficult to envision a justification for a direct ban on satellite communications that could clear these hurdles. If attempted, it should include an exception in the terms of § 1702(b)(1) of the IEEPA.

An indirect restriction on speech has a better chance of success. Here, that issue would arise if a ban on satellite communications were part of a more general ban on financial transactions with Iran and its nationals. *See Kleindienst* v. *Mandel,* 408 U.S. 753 (1972), upholding the government's right to exclude an alien lecturer under speech-neutral criteria in the immigration laws, despite the undoubted rights of Americans to receive ideas from abroad. The Supreme Court's clearest statement of the criteria for reviewing indirect restraints on speech occurred in *United States* v. *O'Brien,* 391 U.S. 367, 377 (1968). The Court set forth four requirements necessary to sustain a restriction: (1) whether it is within the constitutional power of the government; (2) whether it furthers an important or substantial governmental interest; (3) whether the governmental interest is unrelated to the suppression of free expression; and (4) whether the incidental restriction on alleged First Amendment freedoms is any greater than is essential to the furtherance of that interest.[6] Thus, a presidential action against Iran that sweeps up satellite communications in a wider net should be permissible. Again, an exception in the terms of § 1702(b)(1) would be necessary to the extent the IEEPA is the source of authority, and would help to satisfy the *O'Brien* test.

### 7. Block Iran's International Communications by Denying Access to Intelsat

The Intelsat Agreement, Aug. 20, 1971, 23 U.S.T. 3813 T.I.A.S. No. 7532, does not have a specific provision which allows a member's communications to be cut off. The provisions regarding involuntary withdrawal (Art. XVI) all seem to be predicated on failure of a party to live up to its obligations under the Intelsat Agreement. We have no information as to whether Iran is in compliance with the Agreement. The State Department has suggested that denial of access could be accomplished by an extraordinary assembly of the parties and could be accomplished by a two-thirds vote of the 102 members. (Art. VII (e) and (f)). There is no precedent for this, and it is not clear to us whether this power exists.

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[6] The *O'Brien* case was applied in a series of lower court decisions which upheld restrictions on the importation of publications and films under the Trading with the Enemy Act, the IEEPA's predecessor. *Teague* v. *Regional Comm'r of Customs,* 404 F.2d 441, 445 (2d Cir. 1968), *cert. denied,* 394 U.S. 977 (1969); *American Documentary Files* v. *Secretary of the Treasury,* 344 F. Supp. 703 (S.D.N.Y. 1972); *cf. Welch* v. *Kennedy,* 319 F. Supp. 945 (D.D.C. 1970). A similar conclusion was reached by the Third Circuit in *Veterans and Reservists for Peace in Vietnam* v. *Regional Comm'r of Customs,* 459 F. 2d 676 (3d Cir.), *cert. denied,* 409 U.S. 933 (1972).

### 8. Prohibit Financial Transactions Involving U.S. Journalists in Iran, or Otherwise Limit Travel to Iran

Under stated conditions, the President may prevent American citizens from traveling to particular countries at particular times.[7] In 1978, Congress dealt with this subject in an amendment to 22 U.S.C. § 211a, the statute authorizing the Secretary of State to issue passports. The amendment provided:

> Unless authorized by law, a passport may not be designated as restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travellers.

Present circumstances obviously satisfy the last condition of § 211a; the President may restrict future travel to Iran. *See Zemel* v. *Rusk,* 381 U.S. 1 (1965), upholding the President's power to refuse to validate passports for Cuba under an earlier version of this statute. Nevertheless, travel restrictions applied to journalists may pose special problems. The press could bring a lawsuit challenging the government to make a factual showing sufficient to satisfy *O'Brien, supra,* concerning whether there is a need to include journalists in a travel ban in view of their safety to date. Such a suit would probably require at least *in camera* disclosure of the government's reasons for the restrictions. Moreover, restrictions on travel to Iran would have no immediate effect on persons already in that country.

The IEEPA could be used for a broad ban on financial transactions between Americans and Iran or its nationals. Such an order would apply to Americans overseas, and would make further financial transactions with Iranians subject to penalty.

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[7] This power to restrict the travel of American citizens generally to a particular place at a particular time is distinct from the power to inhibit the travel of an individual by revoking his passport on the basis of a determination that his activities "are causing or are likely to cause serious damage to the national security or the foreign policy of the United States." *See* 22 C.F.R. § 51.70(b)(4). The existence and scope of this latter power are currently being litigated. *See Agee* v. *Vance,* 483 F. Supp. 729 (D.D.C. 1980), *appeal docketed.* [Note: In the cited case, the Supreme Court upheld the President's power, under applicable laws and regulations, to revoke a U.S. citizen's passport on national security and foreign policy grounds. *Haig* v. *Agee,* 453 U.S. 280 (1981). Ed.]

### 9. Divert Equipment From the Suspended Iran Foreign Military Sales Pipeline

The present Iranian government took the initiative in canceling the great bulk of foreign military sales contracts with the United States. Near the end of last year, the United States government suspended the rest pursuant to terms of the contracts. It is legally possible that the contracts could still be reinstituted since they have not been cancelled. We understand from the State Department that nothing in the contracts would preclude our making other disposition of the articles being procured while the contracts are suspended.

### 10. A Broad Prohibition Against All Transactions Between Americans Relating to Iran

The preceding analysis suggests that very broad restrictions are permissible under the IEEPA. A caveat is in order, however. The statute is limited to property in which a foreign country or foreign national has an interest. As we noted above, Treasury's regulations define the operative terms of § 1702 to include many kinds of legal interests and their direct or indirect transfer. Thus, it would seem possible to reach transactions in which Iran has an indirect interest, but it is not possible to reach "purely domestic" transactions.

JOHN M. HARMON
*Assistant Attorney General*
*Office of Legal Counsel*

## Litigation Responsibility of the Attorney General in Cases in the International Court of Justice

**Under 28 U.S.C. §§ 516 and 519, the conduct and supervision of litigation in which the United States is a party is reserved to the Attorney General, except as otherwise authorized by law; under 5 U.S.C § 3106, other agencies shall not conduct litigation, but shall refer the matter to the Department of Justice.**

**The Attorney General's authority and responsibility to conduct litigation extends to litigation in foreign and international tribunals, including litigation affecting foreign relations of the United States, and contentious litigated proceedings before the International Court of Justice are thus within his supervisory power.**

April 21, 1980

THE LEGAL ADVISER OF THE DEPARTMENT OF STATE

MY DEAR SIR: I have your letter of March 7, 1980, concerning representation of the United States in the International Court of Justice. The letter and attached memorandum raise the question of the applicability of the litigation responsibility of the Attorney General to cases in the International Court of Justice.

Two provisions, 28 U.S.C. §§ 516 and 519, reserve to the Attorney General "the conduct of litigation in which the United States . . . is a party." A third, 5 U.S.C. § 3106, states the obverse of the same proposition—that other agencies shall not conduct litigation in which the United States is party but shall refer the matter to the Department of Justice. All three allow for exceptions "as otherwise authorized by law."

It seems plain that bringing a contentious or litigated proceeding before the International Court of Justice, as was done in *United States* v. *Iran*, is the conduct of litigation in which the United States is a party. In any case concerning the interpretation of a statute, the starting point must be the language of the statute itself. *Lewis* v. *United States*, 48 U.S.L.W. 4205, 4207 (U.S. Feb. 27, 1980). You suggest, however, that this principle ought not conclude the matter, and we therefore turn to the reasons that you offer.

Your memorandum analyzes the legislative history of the pertinent statutes and concludes that 28 U.S.C. § 516 is not applicable here. You point out that the 1966 codification was not intended to change the law. S. Rep. No. 1380, 89th Cong., 2d Sess. 20–21 (1966).[1] Nevertheless, the analysis concerning § 516 of Title 28, states, "The section concentrates the authority for the conduct of litigation in the Department of Justice." S. Rep. No. 1380, *supra*, at 205 which now appears as 28 U.S.C. § 516, note.[2] In commenting on this provision, the courts have recognized that the Attorney General's litigation power was meant to be "pervasive," *S & E Contractors, Inc.* v. *United States*, 406 U.S. 1, 12 (1972), and "[i]f any [litigation] is conducted, it shall be done by the Department of Justice." *United States* v. *Daniel, Urbahn, Seelye and Fuller*, 357 F. Supp. 853, 858 (N.D. Ill. 1973).

It is true that the section was revised "to express the effect of the law," 28 U.S.C. § 516, note. If there had been preexisting law "otherwise authorizing" the State Department to conduct litigation independent of the Attorney General, then a different result would be indicated. Such authorization must be specific, however, to be viewed as an exception to "the Attorney General's plenary power over government litigation." *ICC* v. *Southern Ry. Co.*, 543 F.2d 534, 537–38 (5th Cir. 1976). Not only is there no preexisting statute, but it appears that there is no formal opinion or agreement covering this matter that could be viewed as having the status of law.[3]

You suggest that the statute is limited in its applicability to domestic courts and that another interpretation would interfere with the ability of the Secretary of State to conduct the foreign affairs of the United States. The responsibility of the Attorney General has not, however, been limited to litigation in domestic courts. 28 C.F.R. § 0.46. This Department regularly supervises litigation in courts in foreign countries. Such litigation frequently raises questions of international law and affects foreign relations of the United States. Domestic litigation has also involved both foreign relations and international law questions fully as much as cases in the International Court of Justice.[4] This fact does not, however, lessen the responsibility of the Attorney General for the conduct of such litigation. At the same time, the Department of Justice recognizes the need for close cooperation with the State Department on matters affecting foreign relations or with any other agency which has specialized experience necessary to the conduct of litigation.

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[1] The statements you cite in the committee reports, which indicate that there are no "substantive changes," refer directly to the enactment of Title 5 and not to amendments to Title 28.

[2] The language of the law conferring litigation authority prior to 1966 was narrower, referring only to suits in the Supreme Court and the Court of Claims. 5 U.S.C. § 306 (1964).

[3] The effect and relevance of the early practice cited is not clear since, with the establishment of the Department of Justice in 1870, the Attorney General assumed responsibility for the legal work of the Department of State. Until 1931, the Solicitor of the State Department was an employee of the Department of Justice. R. Bilder, *The Office of the Legal Adviser*, 56 Am J. Int'l L. 633, 634 (1962). The last significant litigated or contentious case prior to 1966, when § 516 was enacted, was *Interhandel*, which lasted from 1957 to 1959, and where representatives of both the Justice and State Departments appeared as co-agents. *See* 1957 I.C.J. 105, 107–08. The present case, *United States Diplomatic and Consular Staff in Tehran*, is the first contentious case in the I.C.J. involving the United States since enactment of 28 U.S.C. § 516. Other United States involvement in International Court of Justice proceedings since 1966 has related to advisory opinions.

[4] For example, a proposed treaty would vest the International Court of Justice with jurisdiction to resolve fisheries and Outer Continental Shelf boundary disputes with Canada. The issues closely resemble litigation conducted by the Department of Justice presenting the very kinds of issues, both factual and legal, that are raised in domestic litigation.

I conclude, therefore, that litigated proceedings before the International Court of Justice are within the supervisory power committed to the Attorney General by 28 U.S.C. §§ 516, 519, and 5 U.S.C. § 3106. This does not mean, of course, that this Department intends to carry out this responsibility without the fullest participation by your Office. We look forward to such a continuing relationship.

Sincerely,
BENJAMIN R. CIVILETTI

# Presidential Power to Regulate Domestic Litigation Involving Iranian Assets

By its terms the International Emergency Economic Powers Act (IEEPA) gives the President broad authority to regulate the exercise of all rights and privileges "with respect to" foreign property, including their exercise in a judicial context. The legislative history of the IEEPA confirms that Congress intended the President to have discretionary power to regulate court proceedings involving claims to foreign property, as well as the transfer of or creation of interests in such property in a nonjudicial context.

The authority delegated by Congress to the President in the IEEPA to deal with an international emergency should be read as broadly as the statutory text and the Constitution will permit, and no limitations on it should be implied.

The President's power under the IEEPA to prevent the prosecution or adjudication of claims against Iran in the federal courts extends to any claim asserting an interest in property in which Iran has an interest, though it is unclear whether this would include a naked tort claim against Iran which did not otherwise involve the assertion of an interest in property.

June 25, 1980

## MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This memorandun responds to two questions you have asked concerning the President's power under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701 *et seq.* (Supp. I 1977), to take action affecting pending litigation in the federal courts between U.S. nationals and the Republic of Iran. The two questions are the following: (1) Does IEEPA empower the President to order the federal courts to stay these pending cases? (2) Short of taking direct action with respect to the courts, may the President direct the litigants themselves to take no further action with respect to these cases?

As you know, under the authority conferred by IEEPA, the President has already prohibited the unauthorized transfer of Iranian government property subject to U.S. jurisdiction. Moreover, the regulations implementing the President's order provide expressly that the general prohibition against transfer of Iranian property will extend to legal proceedings. The regulations prevent the transfer of Iranian property or the creation of interests in Iranian property through the operation of civil process. They do this in two ways. First, as a matter of substantive property law, they provide that during the life of the blocking order no interest can be created in Iranian property through the operation of civil process (through the entry of judgment, for example). *See* 31 C.F.R. §§ 535.203, 535.310. Second, as a matter of procedure, they prohibit the filing, issuance, or entry of judicial process in some cases,[1] and they invoke the civil and criminal penalties prescribed in IEEPA for any violation of this apparent proscription. *See* § 535.701.

Significantly, these regulations contain a special authorization that exempts the prejudgment elements of most domestic civil litigation from the procedural prohibition to which we have just referred. *See* § 535.304. For purposes of the regulations, the effect of this authorization is to permit litigation to go forward even where it might otherwise involve acts prohibited by the regulations—i.e., acts undertaken with the purpose or intent of creating interests in Iranian property. *See* § 535.310.[2] The exemption does not, however, authorize final judicial action or process of the kind that ordinarily creates interests in property (entry of judgment, etc.); nor does it authorize any judicial proceeding or any part of any judicial proceeding that is "based on" an economic or financial transaction that was in violation of the blocking order. *See* § 535.504(b).

Your inquiry, in essence, is (1) whether the existing regulations are lawful to the extent that they already prohibit litigation involving Iranian property and (2) whether they can be amended to create a legal bar to further litigation during the life of the blocking order, to the extent that they presently permit litigation to go forward under the general authorization we have just described. Our conclusions are (1) that the regulations are lawful to the extent that they now prohibit litigation involving Iranian property, (2) that they could be amended to prohibit what they now permit, and (3) that the amendment could take either of two forms: it could set forth a rule to be applied by the federal courts restricting their jurisdiction to proceed with the adjudication of claims with respect to Iranian property during the life of the blocking order, or it could impose a rule prohibiting claimants from proceeding further with the prosecution of these claims. The reasons for our conclusions are set forth below.

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[1] *See* §§ 535.201, 535.310. The procedural prohibition is cast in terms of a prohibition against the *transfer* of Iranian government property, *see* § 535.201; but the term "transfer" is defined so broadly that it covers any "act" the "purpose, intent, or effect of which" is to create any "interest" in Iranian property, directly or indirectly. The regulations catalogue the kinds of acts that may fall within the prohibition, and in that connection they refer expressly to the filing, issuance, or entry of judgments or other judicial process. *See* § 535.310. Accordingly, we interpret the general prohibition against "transfer" of Iranian property as a prohibition against filing, issuance, or entry of any judicial process where the purpose, intent, or effect of the act is to create an interest in Iranian property. Whether the general prohibition could be interpreted in its present form to prohibit litigants from filing or prosecuting *claims* against Iranian property, we cannot say.

[2] This "authorization" does not purport to authorize litigation, process, or acts with respect to Iranian property that are prohibited by other statutes or laws. *See, e.g.*, 28 U.S.C. §§ 1609, 1611. These provisions of the Foreign Sovereign Immunities Act (FSIA) preclude prejudgment attachment of the property of a foreign sovereign unless the purpose of the attachment is *not* to obtain jurisdiction and the foreign sovereign has explicitly waived immunity from attachment prior to judgment. The IEEPA regulations have not been interpreted as overriding FSIA.

## I.

The relevant statutory language is found in § 203(a)(1)(B) of IEEPA. *See* 50 U.S.C. § 1702(a)(1)(B). Under that subsection the President may, upon a declaration of national emergency, "investigate, *regulate*, direct and compel, nullify, void, *prevent* or *prohibit*, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or *exercising any right, power*, or *privilege with respect to*, or transactions involving, *any property in which any foreign country* or a national thereof *has any interest;* by any person, or with respect to any property, subject to the jurisdiction of the United States." This language was lifted without alteration from § 5(b) of the Trading with the Enemy Act. *See* 50 U.S.C. App. § 5(b)(1)(B). It has a long statutory history.

It is evident that the core of the President's power under IEEPA is his power to block or regulate commercial transactions in which foreign nationals have an interest. But the words themselves indicate rather clearly that Congress intended to confer on the President the power to regulate things other than the mere transfer of foreign property or the creation of interests in foreign property. He may, for example, prohibit or regulate the "exercise of any right, power or privilege" with respect to foreign property; and because the language of the subsection is disjunctive in character, this power is one that he may exercise in addition to his power to regulate, for example, the creation of interests in foreign property, or the use of foreign property, or the transfer of title or possession. Congress has determined that in time of emergency the exercise of rights or privileges with respect to foreign property may create dangers or difficulties that cannot be met by a simple prohibition against transfer or use, and Congress has given the President power to deal with those dangers.[3]

Does IEEPA give the President power to regulate judicial proceedings? IEEPA does not refer expressly to judicial proceedings, but its language is very broad. Of the "rights" and "privileges" that can be exercised "with respect to" foreign property, none is more important than the privilege of asserting a legal claim with respect to foreign property in court—the privilege of demanding and receiving an adjudication of property rights that carries the force of law. If, during an emergency, the President concludes that such a demand or such an adjudication may create a danger related to the emergency that cannot adequately be met by a simple prohibition against the transfer of the property in question, we think that IEEPA gives him power to deal with that danger. If the words mean what they say, the power to regulate or prohibit the prosecution or adjudication of court claims with respect to foreign property is surely within the ambit of the President's larger power to regulate the exercise of rights and privileges "with respect to" foreign property in the first instance.[4] Moreover, in the context of the present Iranian crisis, this argument carries force. The President may well conclude that ongoing litigation involving claims to Iranian property will weaken his hand in dealing with the crisis and that the litigation may create difficulties that cannot be prevented through the simple expedient of prohibiting new entries on the judgment docket. As the litigation progresses, as motions and defenses are allowed or dismissed, as evidence is developed and heard, the present uncertainty regarding rights and liabilities with respect to Iranian property subject to U.S. jurisdiction will diminish. Yet uncertainty can be valuable in international negotiation. If the President decides that uncertainty should be preserved, he may decide that the litigation should come to a halt.

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[3] The language of IEEPA indicates that the President's power under the statute is not plenary. IEEPA expressly denies him power to regulate mere "personal communications" not involving a transfer of "anything of value." 50 U.S.C. § 1702(b)(1). We know of no judicial decision that construes this language, but on its face it imposes a limitation on the President's authority to regulate transactions that do not involve an actual transfer of property having value. The relevant legislative history is not illuminating. *See, e.g.*, S. Rep. No. 466, 95th Cong., 1st Sess. 5 (1977). We do not construe this language as affecting any power that the President might otherwise have under IEEPA to regulate or prohibit the exercise of rights and privileges with respect to property through the assertion of formal claims in court. In our view, the prosecution of a civil claim is not a mere "personal communication" in the sense intended by the statute.

Our task is to determine whether the textual argument is decisive. It is a difficult task. To accept the argument—to read the language as broadly as it might be read—is to accept the proposition that Congress has delegated to the President extraordinary authority to suspend for the time being the operation of a co-equal branch of government in a certain class of cases. We do not doubt that Congress itself has power to do this either by barring the prosecution of these claims during the period of emergency or by restricting temporarily the power of the courts to decide them. But it is another matter entirely to contend and conclude that this slender statutory text confers such power upon the President. Putting IEEPA to one side, we can think of no instance in which Congress has delegated to the President or any other executive officer authority to make discretionary judgments that can affect the jurisdiction of the courts or the rights of litigants in precisely this way.

Our caution notwithstanding, two considerations lead us to conclude that the President's express authority under IEEPA to regulate or prohibit the exercise of rights or privileges with respect to foreign property should *not* be subjected as a matter of interpretation to an implied limitation that would prevent the President from regulating the exercise of rights and privileges with respect to foreign property in court. Those considerations are the following:

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[4] The textual argument is strengthened by the fact that IEEPA expressly preserves to some extent the power that the President enjoyed under § 5(b) of the Trading with the Enemy Act to create "definitions, not inconsistent with the purposes" of the statute, for "any and all terms used" in the statute. Under IEEPA the President is expressly given power to issue regulations, "including regulations prescribing definitions," necessary for the exercise of the "authorities" granted by the statute. *See* 50 U.S.C. § 1704. The predecessor language was construed by the Supreme Court as requiring that the President's emergency power "be given generous scope to accomplish its purpose." *Propper* v. *Clark*, 337 U.S. 472, 481 (1949); *see* 42 Op. Att'y Gen. 363,366 (1968).

First, when Congress enacted IEEPA, it was well aware of the long and creative history of the predecessor statute, the Trading with the Enemy Act. That statute had been used repeatedly for new and important purposes, wherever and whenever its broad and unqualified language would permit new action to be taken.[5] Moreover, when Congress reexamined that history and fashioned IEEPA, it had before it an administrative interpretation that bore upon the very issue that concerns us here—the President's power to regulate judicial proceedings. The Cuban Assets Control Regulations, for example, which had been in place since the early 1960's, contained provisions that purported to prohibit some kinds of judicial proceedings. *See* 31 C.F.R. §§ 515.201(b)(1), 515.310, 515.504(c), 515.504(d). Congress chose to preserve without alteration the statutory language upon which those regulations had been based. Although the relevant legislative history discloses no active consideration of the question of judicial proceedings per se, Congress was well aware of the precedents.[6] In the legislative actions surrounding the enactment of IEEPA, we find no evidence of an intention to reverse this administrative interpretation or to restrict the President's authority on this point.

The second consideration is jurisprudential in nature. The Supreme Court has consistently recognized that in the field of foreign affairs there are compelling reasons for vesting generous discretionary power in the President. He is the "sole organ of the federal government in the field of international relations;" and, with respect to the question of delegated power, "[it] is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success of our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

This oft-quoted language was adopted by the Court in a case very much like the present one. The question was whether the President could lawfully take action under a broad delegation from Congress to impose and preserve a rule of law (a prohibition against the sale of arms) upon which a pending judicial proceeding (the proceeding below) had been founded. The question was treated as one of constitutional dimension under the delegation doctrine, but we think that the Court's observations about the necessary relation between legislative and executive power in the field of foreign affairs are directly relevant to the question of statutory interpretation in the first instance. If Congress delegates power broadly to the President to deal with an international emergency, there is no prudential reason to read the delegation more narrowly than the words and the Constitution will permit. On the contrary, there are reasons to read the delegation broadly. Congressional legislation must often accord the President "discretion and freedom from statutory restriction" to deal with foreign affairs—a "discretion and freedom" that would be inadmissible were domestic affairs alone involved.

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[5] *See Emergency Powers Statutes*, S. Rep. No. 549, 93d Cong., 1st Sess. 184–91 (1973).

[6] The House committee that considered IEEPA compiled an extensive documentary history for use in connection with its hearings which included these regulations. *See Trading with the Enemy: Legislative and Executive Documents Concerning Regulation of International Transactions in Time of Declared National Emergency*, Subcomm. on International Trade and Commerce of the House Comm. on International Relations, 94th Cong., 2d Sess. (Comm. Print 1976).

We think that this principle should be followed in the interpretation of IEEPA. In point of fact, under the predecessor statute the courts consistently recognized the unusual breadth of the power that these few, plain words delegated to the President. The courts refused to recognize implied limitations. *See, e.g., Smith* v. *Witherow,* 102 F.2d 638 (3d Cir. 1939); *Ruffino* v. *United States,* 114 F.2d 696 (9th Cir. 1940); *Pike* v. *United States,* 340 F.2d 487 (9th Cir. 1965); *Sardino* v. *Federal Reserve Bank of New York,* 361 F.2d 106 (2d Cir. 1966). Accordingly, although we have not found a case on point either under the old statute or the new, we are not inclined to recognize implied limitations here. We are of opinion that the President's power to regulate or prohibit the exercise of rights, powers, or privileges with respect to foreign property, must be read to include a power to regulate or prohibit the exercise of rights, powers, or privileges through the prosecution or adjudication of claims with respect to foreign property in court—a power that he may exercise in addition to his power to prevent the transfer of, or the creation of interests in, foreign property.

## II.

Precisely what kinds of claims are a proper subject for presidential regulation under IEEPA? Under the statute, they must be claims exercising a right, power, or privilege "with respect to . . . property" in which Iran or an Iranian national has an "interest." The key words are "property" and "interest." The presence of "property" or an "interest" in property triggers the power to act. In the absence of "property" or an "interest" in property, the statute confers no power. We are prepared to read this language broadly, but in the end the International Emergency Economic Powers Act does not confer plenary power upon the President to regulate all things foreign.

In accordance with that principle, we think that the President's power to prevent the prosecution or adjudication of claims against Iran in the federal courts extends to any claim asserting an interest in or under an account or other specific property in which Iran has an interest. Moreover, it seems to us that the assertion of a claim against Iran, whatever its legal basis, will be tantamount to the assertion of a claim "with respect to" Iranian property whenever (1) the underlying obligation is secured by Iranian property under contract or by law, or (2) the viability of the claim in court depends upon the assertion of an interest in Iranian property (as in the case of a claim asserted pursuant to a jurisdictional attachment).[7] It might even be possible to read the statute broadly to permit the regulation of claims of debt asserted without reference to any extraneous property interest. Instruments of debt (bonds, notes, etc.) are the "property" of the claimant, and they are also property in which the obligor (Iran) has an "interest" in a general sense. Finally, if the language of the statute can be given a broad construction, nonetheless we think it cannot be read as a general grant of authority to control every conceivable instance of domestic litigation with Iran. For example, we think it unclear that the assertion or adjudication of a naked tort claim against Iran could itself be considered an exercise of a right, power, or privilege with respect to "property" in which Iran has an "interest;" and we doubt that the proceeding in which the claim is asserted could itself be regarded, without more, as a transaction "involving" property within the meaning of the statute. The President would of course have power to prevent foreign property from being transferred to satisfy the underlying claim, to satisfy any judgment that might be rendered in the case, and to prevent the entry of any judgment from creating an interest in property as a matter of law. But if the President exercised that power and the claim itself involved no actual assertion of rights or privileges with respect to property, in our view it would be difficult to find in the statute a basis for further presidential action.

## III.

We wish to emphasize, again, that our interpretation of the statute is based not upon any judicial decision discussing or deciding the question at issue, but upon what we believe to be a reasonable reading of the statutory language in light of the relevant historical and jurisprudential considerations. The decisive consideration, in our view, is the one that we have already mentioned: Congress has given the President power to do more than prevent the use or transfer of foreign property during the pendency of a national emergency. Congress has contemplated that the mere exercise of rights, powers, or privileges with respect to foreign property may create dangers that cannot be met by a prohibition against transfer or use; and Congress has given the President power to deal with those dangers.

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[7] *See* note 2 *supra.*

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*Office of Legal Counsel*

# Suspension of the Foreign Sovereign Immunities Act in Litigation Involving Iranian Assets

**It is doubtful that the International Emergency Economic Powers Act can be utilized to override conflicting provisions of a comprehensive and specific federal statute such as the Foreign Sovereign Immunities Act, particularly where such action is not demonstrably necessary to dealing with the underlying national emergency.**

July 22, 1980

## MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

We have been asked to address the question whether the President has the authority under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701 (Supp. I 1977), to suspend the Foreign Sovereign Immunities Act of 1976 in litigation now pending against Iran. We assume that this action would effectively bar Iran from asserting a sovereign immunity defense both as to attachment and on the merits. The complete suspension of the Immunities Act would include provisions providing procedures for obtaining jurisdiction and related matters, such as service, *e.g.*, 28 U.S.C. §§ 1330, 1608, which presumably ought to be left in place if the litigation is to proceed. Moreover, since, prior to the Immunities Act, there was absolute immunity from execution against a foreign sovereign,[1] we assume that the provisions of the Act permitting the possibility of execution would remain.

We first analyze IEEPA to see if the power to affect sovereign immunity is a possible use of its power and then discuss its relationship to the Immunities Act. The IEEPA, as we have discussed previously,[2] provides very broad power for the President in dealing with property in which any foreign country has an interest during a national emergency. 50 U.S.C. § 1702(a)(1)(B). The emergency declared on November 14, 1979, with respect to Iran (Exec. Order 12,170, 3 C.F.R. 457 (1979)) is sufficient to invoke these powers as to Iranian property blocked by that order. Under the statute, the President may "regulate, . . . nullify, void, prevent or prohibit, . . . exercising any right, power, or privilege with respect to . . . any property in which any foreign country has any interest, . . . with respect to any property, subject to the jurisdiction of the United States."

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[1] *See* Kahale & Vega, *Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States*, 18 Colum J. Transnat'l L. 211, 217 (1979).

[2] *See, e.g.*, Memorandum Opinion for the Attorney General, June 25, 1980 ["Presidential Power To Regulate Domestic Litigation Involving Iranian Assets," p. 236, *supra*].

In determining the intent of Congress, we began with the literal meaning of the words employed to provide a threshold determination. *United States* v. *Yoshida International, Inc.*, 526 F.2d 560, 573 (C.C.P.A. 1975) (upholding import surcharge under Trading with the Enemy Act). The literal language would permit the President to prohibit the Iranian government from exercising the right or privilege of invoking sovereign immunity in any lawsuit where its property subject to U.S. jurisdiction, *i.e.*, blocked assets, is concerned. There is no indication that IEEPA or its predecessor, the Trading with the Enemy Act, have ever been used for this purpose nor is there any evidence that this use was anticipated when the IEEPA was passed.[3] This, by itself, would not be fatal since IEEPA is an emergency statute and one does not expect, from its very nature, that Congress will anticipate all of the ways in which it will be used. *Id.* at 573, 576, 578.

Moreover, the crucial language in IEEPA was taken from the Trading with the Enemy Act, 50 U.S.C. App. § 5(b). There is a long history under the former of the Act being used in the broadest manner which its language would bear. Its use over the years shows its expansion as a result of continuing interplay between the Executive and Congress. *See* "Emergency Power under § 5(b) of the Trading with the Enemy Act" in S. Rep. 549, 93d Cong., 1st Sess. 184 (1973); 42 Op. Att'y Gen. 363 (1968) (upholding Foreign Direct Investment Program); Letter from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, to the General Counsel, Department of Commerce, Sept. 29, 1976 (validity of export controls), reprinted in International Trade Reporter's U.S. Export Weekly, Oct. 19, 1976, No. 128 ("1976 OLC Letter"); *Cf. United States* v. *Yoshida International, supra*, collecting cases at note 16. Although enactment of IEEPA represented a reaction to this use, Congress did not narrow the pertinent language.[4] Instead, it sought to control the use of emergency power through the use of procedural requirements for emergency declarations, 50 U.S.C. § 1701, and imposition of congressional consultation and reporting requirements. 50 U.S.C. § 1703. *See also* National Emergencies Act, 50 U.S.C. § 1601 *et seq.*, which asserts a congressional veto procedure for national emergencies. Thus, if only IEEPA were involved, a persuasive argument could be made that the sovereign immunity defense could be denied Iran.

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[3] An argument might be made, however, that freezing Iranian funds and then removing immunity is tantamount to seizure. The legislative hsitory of IEEPA shows that seizure was not authorized. *Revision of Trading with the Enemy Act; Markup before the House International Relations Committee*, 95th Cong., 1st Sess. 2, 4, 20 (1977). The differences between the proposal and seizure are sufficient, however, so that we do not think that the legislative history by itself would be determinative. When property is seized, it is taken directly by the government without judicial process. Here the government would not take the property and the courts would make determinations in the usual manner.

[4] Certain changes were made, such as exclusion of wholly domestic transactions from coverage in peacetime, but they are not crucial here. Compare 50 U.S.C. § 1702(a)(1) with 50 U.S.C. App. § 5(b)(1).

The more difficult question is whether IEEPA can be used to override the Immunities Act. Prior to its enactment, decisions concerning whether sovereign immunity should apply were made on a case-by-case basis through a quasi-judicial procedure at the State Department. If the State Department decided to grant immunity, it would ask the Justice Department to file a suggestion of immunity with the court in which the action was pending. The suggestion was considered binding on the courts, whether positive or negative. *Victory Transport, Inc.* v. *Comisaria General,* 336 F.2d 354, 358 (2d Cir. 1964), *cert. denied,* 381 U.S. 934 (1965). Political judgments and foreign relations considerations often entered into such decisions and the practice was much criticized for its inherently political nature.[5] As a result, the Executive proposed the Immunities Act to free itself from making *ad hoc* diplomatic decisions in these matters:

> Today, when a foreign state wishes to assert immunity, it will often request the Department of State to make a formal suggestion of immunity to the court. Although the State Department espouses the restrictive principle of immunity, the foreign state may attempt to bring diplomatic influences to bear upon the State Department's determination. A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. The Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity. . . . U.S. immunity practice would conform to the practice in virtually every other country—where sovereign immunity decisions are made exclusively by the courts and not by a foreign affairs agency.

H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7 (1976).[6] Congress also made clear its intention "to preempt any other State or Federal law . . . for according immunity to foreign sovereigns." *Id.* at 12.

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[5] Kahale & Vega, *supra* note 1 at 216.

[6] In proposing the legislation to the Congress, a joint State-Justice letter noted its broad purpose: "to facilitate and depoliticize litigation against foreign states." 1975 Digest of U.S. Practice in Int'l L. 346. *See also Jurisdiction of U.S. Courts in Suits Against Foreign States, Hearings on H.R. 11315 before the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee,* 94th Cong., 2d Sess. at 26, 27, 29, 34 (1976).

The question thus arises as to whether, having removed immunity decisions from foreign policy considerations in 1976, Congress authorized the President to make exceptions when it passed IEEPA in 1977. Clearly, any emergency statute affects existing rights under other laws. The language of IEEPA, in its reference to regulating and voiding rights and privileges relating to property, recognizes that pre-existing rights arising from other laws will be affected. The Iranian assets freeze, for example, clearly takes precedence over the banking laws and contract law regarding the rights of depositors to withdraw money from banks. A recent case upholding a novel use of the Trading with the Enemy Act stated, "if *every* law applicable to tranquil times were required to be followed in emergencies, there would be no point in delegating emergency powers and no adequate, prompt means for dealing with emergencies." *Yoshida,* 526 72d. at 583. At the same time, the court in *Yoshida* took great pains to show that the 1971 import surcharge was designed so as not to conflict with the specific tariff rates that had been enacted by Congress. *Id.* at 577–78. We know of no case where IEEPA or the Trading with the Enemy Act was used in a situation which brought it into direct conflict with a comprehensive and specific federal statute, such as the Immunities Act. The Trading with the Enemy Act was used on a number of occasions to provide export controls when Congress had allowed export control legislation to expire but there was no legislation forbidding such controls and no indication that Congress, by permitting expiration, opposed such controls. *See* 1976 OLC Letter, *supra.*

For these reasons, it is our judgment that it is quite doubtful that IEEPA can be utilized to override the highly specific provisions of the Immunities Act. In any event, we would question the wisdom of attempting to invoke IEEPA in a case in which it cannot be forcefully maintained that the President's action is, in some important and demonstrable way, necessary to dealing with the underlying emergency. While it might be possible to sustain in court the use of IEEPA if that action were essential to resolving the hostage crisis, it seems to us highly unlikely that we would succeed where the action is at best peripheral to the crisis. The primary implication of an emergency power is that it should be effectively designed to deal with a national emergency. *Lichter* v. *United States,* 334 U.S. 742, 782 (1948). Here, where the assets are already frozen and the Administration has the discretion to seek legislation to seize the assets, it will be difficult to demonstrate the necessity for the attenuated assertion of power.

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# Presidential Authority to Settle the Iranian Crisis

**The President has the constitutional and statutory authority to enter an executive agreement with Iran which settles American citizens' claims against Iran; claimants who receive less than the stated value of their claims should not be able to recover additional compensation from the United States government on the theory that the settlement constituted a taking under the Fifth Amendment.**

**The President may, through orders issued under the International Emergency Economic Powers Act (IEEPA), free currently blocked Iranian assets and effect their return to Iran, notwithstanding the existence of court orders of attachment for bidding the removal of Iranian funds from the banks holding them, by revoking the existing general license for the attachments under the Iranian Assets Control Regulations and licensing Iranian withdrawals from the blocked accounts. Since private banks may refuse to honor withdrawal licenses after the attachments are revoked for fear of liability under state law to the attachment claimants, funds held by federal banking entities should be relied on as the source of any amounts promised to be returned forthwith to Iran.**

**Foreign branches of American banks are subject to orders issued under authority of the IEEPA and, once withdrawal licenses are issued, there should be no legal impediment to Iranian withdrawals from previously blocked accounts as long as previously licensed setoffs are observed. If creditors of Iran seek to attach these accounts through actions in foreign courts, it is likely that those courts would allow their own domestic claimants a special priority.**

**The President may, under existing law, take several kinds of actions to assist Iran in effecting the return of the former Shah's assets in the United States. These actions include blocking the assets under the IEEPA to facilitate a census and prevent their removal, undertaking to aid Iran in its litigation to recover the assets, informing the court of our position on foreign sovereign immunity and act of state doctrines, or taking an assignment of its claims from Iran. However, vesting the Shah's assets in the government would require new legislative authority and even then would give rise to a takings claim for just compensation by the Shah's estate.**

September 16, 1980

## MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This responds to your request for our views concerning the President's power to settle the current crisis with Iran without the enactment of additional legislation. We believe that the President has the constitutional and statutory power necessary to enter an agreement with Iran settling the principal issues now outstanding, and to implement that agreement in an effective fashion. In particular, we conclude as follows. First, the President has the constitutional and statutory power to enter an executive agreement with Iran that settles American citizens' claims and returns some blocked funds to Iran. Second, to implement such an agreement, the President may, under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701 *et seq.* (Supp. I 1977), license Iran to withdraw blocked funds, although the President would first have to revoke existing licenses for attachments against those funds. Federal entities and private banks in the United States could then safely permit withdrawals by Iran, although the private banks may perceive sufficient risk of liability to disappointed lien claimants to refuse to recognize the validity of licenses for withdrawals. Third, once withdrawals are licensed there will be no impediment to Iranian withdrawals from foreign branches of American banks, at least if previously licensed setoffs by those banks are left undisturbed. Fourth, a settlement agreement may provide for the United States to aid Iran in recovering the Shah's assets in the current litigation in New York state court, although an immediate return of those assets would not be possible. Finally, all these arrangements can be structured in a way that makes successful takings claims unlikely.

## I. Settlement of American Claims Against Iran by Executive Agreement

### *A. Presidential Power*

The authority of the President to enter executive agreements with other nations in order to settle claims has been explicitly upheld by the Supreme Court. *United States* v. *Belmont,* 301 U.S. 324, 330–31 (1937); *United States* v. *Pink,* 315 U.S. 203 (1942) ("That the President's control of foreign relations includes the settlement of claims is indisputable." Frankfurter, J., concurring, 315 U.S. at 240); *see also* Restatement (Second) of Foreign Relations Law § 213 (1965). *Belmont* and *Pink* upheld the Litvinov Assignment, by which outstanding Soviet claims were assigned to the United States by a simple exchange of letters between the President and the Soviet Foreign Minister. Both cases emphasized the Executive's exclusive constitutional power to recognize foreign governments and to normalize diplomatic relations with them, and viewed claims settlements as necessary incidents of the Executive's foreign relations power. *See generally United States* v. *Curtiss-Wright Export Corp.,* 299 U.S. 304 (1936).

Although the President's constitutional powers almost certainly suffice to authorize an executive agreement with Iran that would take an assignment of some blocked assets and return others, support may be drawn as well from the President's statutory power under IEEPA. That statute, which authorizes the current blocking of Iranian assets, was drafted in explicit recognition that the blocking of assets could have as a primary purpose their preservation for later claims settlement. H.R. Rep. No. 459, 95th Cong., 1st Sess. 17 (1977); S. Rep. No. 466, 95th Cong., 1st Sess. 6 (1977). Thus, IEEPA's § 1706(a)(1) authorizes the continuation of controls after the underlying emergency has ended, where "necessary on account of claims involving such country or its nationals." The need to provide a means for orderly termination of a blocking of assets once the emergency has passed implies presidential power to resolve the plethora of claims that will invariably arise.

Historical practice reflects the existence of presidential power to settle claims. While claims settlements have often been concluded by treaty or convention, historical examples abound of settlements through executive agreement. Numerous lump-sum agreements have settled claims of American nationals against foreign nations. *See, e.g.,* Claims Settlement Agreement, July 16, 1960, United States-Poland, 11 U.S.T. 1953, T.I.A.S. No. 4545; Claims Settlement Agreement, July 19, 1948, United States-Yugoslavia, 62 Stat. 2658, T.I.A.S. No. 1803. History also provides numerous examples of claims settlements through executive agreements that establish international arbitrations rather than provide a lump sum. *See generally* W. McClure, International Executive Agreements 52–56 (1941). In 1935, a congressional study identified 40 arbitration agreements entered into by the Executive between 1842 and 1931 which were not submitted to the Senate for advice and consent. 79 Cong. Rec. 969–971 (1935).[1]

### *B. Constitutional Takings Claims*

A question that has not been clearly settled is whether any right of action exists for claimants who allege that a settlement provides them with less than what they consider to be the real value of their claims. Agreements have traditionally provided significantly less than the amounts claimed.

The principle of international law that a sovereign may settle debts of nationals has a corollary—a national has no legal claim to any particular funds received in a claims settlement that extinguishes his claim. *See Boynton* v. *Blaine,* 139 U.S. 306 (1891); *Williams* v. *Heard,* 140 U.S. 529, 537 (1891). The Supreme Court has held that even payments received "on behalf of" an American claimant do not legally belong to him, and that the Executive Branch could refuse to remit payments received from a foreign government (allegedly because it suspected the claimants of fraud). *La Abra Silver Mining Co.* v. *United States,* 175 U.S. 423 (1899). This supports the generally held view that an American has no recourse against his government's settlement, except to petition Congress for relief. *See* Christensen, *The United States-Rumanian Claims Settlement Agreement of March 30, 1960,* 55 Am. J. Int'l L. 617, 625 (1951). No case has been found adjudicating the right to such compensation.

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[1] We perceive no reason to believe that passage of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.*, was in any way intended to limit the established constitutional power of the President to settle claims, or in any way to alter the substantive law of liability. 1975 State Dept. Digest of U.S. Practice in Int'l Law 353.

Dissatisfied claimants have, nevertheless, raised the issue in connection with previous settlements, *see International Claims Settlement Act, Hearings on H.R. 9063 Before the Subcommittee on Europe of the House Committee on Foreign Affairs*, 90th Cong., 1st Sess. 50–55 (1967); *International Claims Settlement Act, Hearings on S. 1935 and S. 2064 Before the Subcommittee on Europe of the House Committee on Foreign Affairs*, 89th Cong., 2d Sess. 42, 48–49, 74–77 (1966). Scholars in the field have recognized the argument without necessarily endorsing it. Henkin, Foreign Affairs and the Constitution, 262–66 (1972); Oliver, *Executive Agreements and Emanations from the Fifth Amendment*, 49 Am. J. Int'l L. 362, 364 (1955); *cf.* Restatement, *supra*, Reporters' Note to § 213; Leigh & Atkeson, *Due Process in the Emerging Foreign Relations Law of the United States*, 21 Bus. Law. 853, 870–77 (1966).

Two historic Court of Claims cases discuss the taking question. *Gray* v. *United States*, 21 Ct. Cl. 340 (1886), *Meade* v. *United States*, 2 Ct. Cl. 224 (1866), *aff'd*, 76 U.S. (9 Wall.) 691. *See generally* W. Cowles, Treaties and Constitutional Law: Property Interferences and Due Process of Law, 200–21 (1941). *Gray* concerned settlement of the French Spoliation claims of the early 1800's, relating to damage done to American vessels from 1793 until 1801 by the French navy. Negotiations between France and the United States led to an agreement: the United States agreed to release the French from all claims by American nationals and France agreed not to insist upon enforcement of the alliance between the two countries. The court opined that where the Government extinguished the American claims in order to further its foreign policy, it had taken private property for a public use and the claimants were thereby entitled to compensation. We would note that in the negotiation of 1800, "individual" claims were used against "national" claims, and the setoff was of French national claims against American individual claims. Responding to this, the court said:

> It seems to us that this "bargain" . . . falls within the intent and meaning of the Constitution, which prohibits the taking of private property for public use without just compensation. We do not say that for all purposes these claims were "property" in the ordinarily accepted and in the legal sense of the word; but they were rights which had value, a value inchoate, to be sure, and entirely dependent upon adoption and enforcement by the Government; but an actual money value capable of ascertainment the moment the Government had adopted them and promised to enforce them, as it did in August, 1793, and constantly thereafter. That the use to which the claims were put was a public use cannot admit of a doubt, for it solved the problem of strained relations with France and forever put out of existence the treaties of 1778, which

> formed an insuperable obstacle to our advance in paths of peace to the achievement of commercial greatness.

*Id.* at 393. The court's opinion was advisory; Congress had asked the court to hear the claims and report to it. Thus, the court noted that it was examining the "ethical," not "legal" rights of a citizen against his government, *id.* at 406–07, although this would not change the constitutional analysis.

The *Meade* case involved an effort by a citizen to obtain payment from the United States government after settlement of claims with Spain in 1819. After the signing of a treaty between the United States and Spain but prior to Spain's ratification, Meade submitted a contract claim to Spain and Spain agreed to pay a certain amount. The treaty established a claims commission; Meade presented his claim to it with evidence of the Spanish settlement. He was unable, however, to produce documents requested by the Commission because they had been sent to Spain; he received no payment. Congress subsequently referred the claim to the Court of Claims. Three members of the court wrote opinions. The majority held that the release and cancellation of Meade's claim against Spain was an appropriation of private property to public use and came within the Just Compensation Clause of the Constitution. 2 Ct. Cl. at 275. Nevertheless, it said Meade was entitled to no compensation because the Commission's decision not to award compensation could not be reexamined by the Court of Claims. *Id.* at 275–76. A concurring opinion found no compensable taking since the right of eminent domain had not been exercised. The dissent found a compensable taking, but distinguished Meade from the general class of claimants because he was a creditor armed with a settlement entered into by the government of Spain rather than a claim which had not been acknowledged by a foreign power. Thus, a majority of the court held that a compensable taking had occurred, yet a different majority held that Meade's heirs were entitled to no compensation from the government. The Supreme Court affirmed, 76 U.S. (9 Wall.) 691, but did not reach the constitutional question.

The question now arises as to what reaction the courts would have to these opinions written many years ago. While the courts in recent years have become increasingly sensitive to the procedural requirements imposed by the Due Process Clause, *e.g., Goldberg* v. *Kelly,* 397 U.S. 254 (1970), they have also recognized that extensive use of regulatory powers by the government is not necessarily a taking. Destruction of a monetary claim might have serious consequences for claim holders but may be no more serious than the economic consequences flowing from other regulation not considered a taking. The complexity of the modern world and the increased, almost pervasive regulation that is found in international trade have led to the realization that losses can arise from export controls, import controls, embargoes, and similar government acts. Individual contracts and profits are often sacrificed for what is perceived as greater foreign policy benefits.

There is no set formula for deciding when the Due Process Clause requires that economic injuries caused by public action be compensated by the government rather than remain disproportionately concentrated on a few persons. *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104, 124 (1978). Essentially *ad hoc* factual inquiries have been considered necessary. *Id.* When there is a physical invasion by the government a taking may more easily be found than when there is a public program adjusting benefits and burdens of economic life to promote the common good. *Id.* The mere fact that property, in this case claims, may be reduced in value does not mean that a taking has necessarily occurred. *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594 (1962); *cf. Miller* v. *Schoene*, 276 U.S. 272 (1928) (upheld destruction without compensation of cedar trees to protect apple orchards from rust).

The courts are also more likely to uphold government action against "taking" claims during war and emergency situations which make demands that "otherwise would be insufferable." *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *Bowles* v. *Willingham*, 321 U.S. 503, 517 (1944); *United States* v. *Caltex*, 344 U.S. 149 (1952).

Applying the kind of balancing suggested by recent cases leads to persuasive arguments against the contention that a settlement for less than value is a taking. In dealing with an international emergency, the President must be able to act quickly and without fear that the courts will intervene for any but the most compelling reasons. *Cf. Narenji* v. *Civiletti*, 617 F.2d 745 (D.C. Cir. 1979).

Because of the delicate nature of the negotiations with Iran, it is impossible for a court to review political issues and put a value on the extent to which foreign policy considerations may have prevailed over monetary ones. In addition, because of deep government involvement in the crisis, (*i.e.*, the freeze, trade controls, the World Court action) it would be difficult for individuals to demonstrate what they would have recovered absent government intervention.[2] In sum we believe that claimants who receive less than the stated value of their claims should not be able to recover additional compensation from the government on the theory that the settlement constituted a taking.

## II. Presidential Authority to Return Blocked Assets to Iran

We now consider whether the President may, through orders issued under IEEPA, free the currently blocked Iranian assets and effect their return to Iran. Although the President has broad powers under IEEPA, to issue orders blocking or releasing these assets,[3] difficulties arise because the banks holding the Iranian accounts are presently subject to a variety of court orders, principally attachments and preliminary injunctions, that forbid removal of the funds.[4]

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[2] We would note that these arguments can also be viewed as separate grounds for defending a settlement apart from the taking issue.

The President's action would presumably be to revoke the existing general license for the attachments and to license Iranian withdrawals from the blocked accounts. (Simply to lift the freeze would probably allow the attachments to vest, preventing removal of the funds indefinitely.) Our conclusion is that the President has ample authority under IEEPA to revoke licenses for attachments and to license withdrawals of blocked funds.

On November 14, 1979, Executive Order No. 12,170 blocked Iranian government assets and the Treasury Department issued the first of its Iranian Assets Control Regulations (IACR), which provided in part:

> Unless licensed or authorized pursuant to this part any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property in which on or since the effective date there existed an interest of Iran.

31 C.F.R. § 535.203(c). And on November 19, 1979, § 535.805 was added, providing that any licenses "may be amended, modified or revoked at any time." A limited modification to the general ban on unlicensed judicial proceedings was made subsequently on November 23, 1979, with the adoption of § 535.504, which authorized judicial proceedings, but continued the ban on judgments and payments from blocked accounts. And finally, on December 18, 1979, an interpretive rule was added to clarify the permissible scope of judicial action:

> The general authorization for judicial proceedings contained in § 535.504(a) includes pre-judgment attachment. However, § 535.504(a) does not authorize payment or delivery of any blocked property to any court, marshal, sheriff, or similar entity, and any such transfer of blocked property is prohibited without a specific license. It would

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[3] The IEEPA's principal operative provision, § 1702(a)(1), provides that the President may:

(A) investigate, regulate or prohibit—
  (i) any transactions in foreign exchange,
  (ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,
  (iii) the importing or exporting of currency or securities; and
(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest.

[4] For convenience, we will refer to these orders generically as attachments, since that is the nature of most of them.

> not be consistent with licensing policy to issue such a license.

31 C.F.R. § 535.418. Thus, the current situation is that the great majority of attachments and similar court orders exist pursuant to Treasury's general license; there are, however, scattered instances of process that was perfected before last November 14th. We understand that these pre-blocking attachments affect only a small portion of the Iranian assets. Because these attachments have priority to the licensing program, it may not be possible to revoke them simply by amending the IACR. *See Propper* v. *Clark,* 337 U.S. 472 (1949). These attachments may, however, be destroyed by an exercise of the President's constitutional power to settle claims.[5]

Against this background, we turn to the effect of the major Supreme Court cases in the field. In *Zittman* v. *McGrath,* 341 U.S. 446 (1951) (*Zittman I*), claimants attached New York bank accounts of German banks, which had previously been frozen by executive order. After the war, the Alien Property Custodian issued orders vesting the accounts in himself, but the banks refused to release them because of the still-pending attachments. The Custodian sought a declaratory judgment that the claimants had no interest in the assets, and lost. The Supreme Court noted that after the attachments had taken effect, the government issued a ruling which it argued should be applied retroactively, designating attachments as prohibited transfers. Without deciding whether such a rule could have retroactive effect in other circumstances, the Court refused to apply it to these attachments because to do so would be inconsistent with the government's earlier position regarding attachments. Treasury had represented in similar litigation that it did not wish to interfere with court proceedings, including attachments, because it was desirable to obtain adjudications of disputed rights to assets subject to the need for a license for any transfer of them. Treasury had thus encouraged litigation to go forward to conclusion, with the reservation that the value of interests so adjudicated might range from worthless to full value, depending on whether a transfer application met the government's purposes in administering the freeze program.

The Court accordingly concluded that the Custodian had

> put himself in the shoes of the German banks. As against the German debtors, the attachments and the judgments they secure are valid under New York law, and cannot be cancelled or annulled under a Vesting Order by which the Custodian takes over only the right, title, and interest of those debtors in the accounts.

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[5] Our preceding analysis, concluding that the President may enter agreements resulting in final settlements of the claims of American citizens, makes it clear that an incident of such a settlement would be the voiding of attachments and other inchoate interests relating to those claims. *United States* v. *The Schooner Peggy.* 5 U.S. (1 Cranch) 103 (1801).

341 U.S. at 463–64. At the same time, the Court recognized that the Custodian could take possession of the assets for administration under the Act. This disposition left the ultimate status of the state law liens for later determination.

In a companion case, *Zittman* v. *McGrath*, 341 U.S. 471 (1951) (*Zittman II*), the Court granted the Custodian possession of attached accounts, for administration under the Act. The Court distinguished *Zittman I* as involving the Custodian's attempt to assert that the freezing program "precluded attaching creditors from obtaining any interest in the blocked property good as against the debtors," whereas here only possession was sought, without prejudice to the attaching creditors' rights.

Subsequently, in *Orvis* v. *Brownell*, 345 U.S. 183 (1953), the Court considered a closely similar set of facts, but with one crucial legal difference. Again, claimants obtained attachments and judgments, valid in New York law, against previously blocked assets. This time, however, the Court interpreted a similar prohibition of "transfers" to forestall attachment from creating any rights against the Custodian. The consequence was to deny the claimants a special priority in particular property, leaving them with general debt claims, to which the state court determinations would presumably be relevant.

The present program licenses attachments and litigation, but stops short of permitting judgments. The evident purpose is to allow initial sorting out of claims and preservation of evidence in contemplation of later use in some federal distribution system, much as was the function of litigation in the *Zittman* cases and in *Orvis*. The government has so characterized it in court:

> 535.504 specifically grants a license for initiating judicial proceedings, while withholding a license for a "judgment or of any decree or order of similar or analogous effect." This distinction serves several important purposes and is vitally related to the President's (and his delegee's) purpose to protect those with lawful claims against Iran while preserving the President's flexibility to adopt an approach to satisfy claims in an orderly and equitable fashion. Permitting claims to go forward permits claimants to avoid problems of statute of limitations, and may provide a vehicle for preserving critical evidence necessary to establish claims, whether they are finally resolved through subsequent licensing of judgments, resolution through an administrative claims process, or otherwise. Similarly, permitting the filing of suits puts Iran on notice of claims for which it may be held liable and thus serves to promote efforts to secure satisfactory protection of claimants' interest. At the same time withholding license

> for judgments helps assure that the President maintains the flexibility to determine an orderly method of resolving legitimate claims that assures equity among claimants and provides maximum protection for creditors consistent with the President's on-going efforts to secure the hostages' release.
>
> The approach works no unfairness on the litigants. The United States' consent to permit the litigation to go forward, expressed in the general license granted by 535.504, has always been expressly conditioned on the withholding of a license for judgments. To interpret the regulation to permit creation or extinguishing of interests in property through, *e.g.*, summary judgment on liability or on motions to dismiss with prejudice "would ignore the express conditions on which the consent was extended." *Orvis* v. *Brownell*, 345 U.S. 183, 187 (1953). *See also Propper* v. *Clark*, 337 U.S. 472, 485 (1949), where the Court recognized that the United States might permit litigation to go forward under the TWEA, while limiting the rights obtainable through litigation.

Memorandum in Support of United States Request that the Court Defer Ruling on the Pending Motions, *Charles T. Main International, Inc.*, v. *Khuzestan Water and Power Authority*, No. 79-2034C, D. Mass. Identical motions are being filed in other cases.

Thus, in the Iranian Assets Control Regulations, the government has reserved full rights to revoke the licensed attachments.[6] Although federal entities holding blocked funds can be expected to honor withdrawal licenses after the attachments are revoked, private banks may refuse to do so, fearing liability to the attachment claimants. The claimants could sue the banks for wrongfully releasing the funds, arguing that under *Zittman I*, the government is not in a position to abnegate all their state law rights against their debtors, and that under New York law, a wrongful release of attached property makes the banks liable for an accounting. *See Fitchburg Yarn Co.* v. *Wall & Co.*, 46 A.D. 2d 763, 361 N.Y.S. 2d 170 (1974). Against such an argument the exculpatory provision of IEEPA, § 1702(a)(3), appears to provide a complete defense. It provides:

> Compliance with any regulation, instruction, or direction issued under this chapter shall to the extent thereof be a full acquittance, and discharge for all purposes of the obligation of the person making the same. No person shall be held liable in any court for or with respect to anything

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[6] Because of the reservation of the right to revoke these attachments, it is clear that they can be revoked under IEEPA without giving rise to a successful takings claim. *See, e.g., Bridge Co.* v. *United States*, 105 U.S. 470 (1881); *United States* v. *Fuller*, 409 U.S. 488 (1973).

> done or omitted in good faith in connection with the administration of or pursuant to and in reliance on, this chapter, or any regulation, instruction, or direction issued under this chapter.

This provision appears to be a complete barrier to state law liability for release of blocked funds pursuant to presidential directive. Nevertheless, the presence of its predecessor does not seem to have assuaged the banks' concerns in the cases described above. Because this provision does not appear to have been litigated, firm conclusions about its scope are difficult. Moreover, there appears to be no conclusive legislative history indicating that it is meant to bar state law liabilities of all kinds. Therefore, because a presidential directive is arguably ineffectual to destroy the attachments for all purposes, the banks may not be willing to rely on it.[7] Their exposure is great; faced with a choice of disobeying a government order (which could subject them to a civil penalty of $10,000 and criminal penalties that may be unlikely in a case of unclear legalities), or releasing billions of dollars for which they may later be asked to account, the banks may insist on legislation granting them more specific protection than does the present statute before they will release the blocked funds.

Therefore, funds held by federal entities should be relied on as the source of any amounts promised to be returned forthwith to Iran, because the disposition of the Iranian funds held by private banks, at least in the United States, will surely be the subject of litigation.

## III. Funds Blocked in Foreign Branches of American Banks

The possibility that licenses will be issued for Iranian withdrawals from foreign branches of American banks raises the question of the permissible extraterritorial effect of domestic regulation. First, the United States has authority to exercise jurisdiction over its nationals abroad. *Blackmer* v. *United States,* 284 U.S. 421 (1932) (upholding contempt against U.S. citizen residing in France for failure to respond to D.C. Supreme Court subpoena); *Cook* v. *Tait,* 265 U.S. 47 (1924) (upholding tax levied against non-resident U.S. citizen for income from property located outside the United States). Although international law principles are unsettled for determining the nationality of corporations, the generally accepted U.S. rule is that corporations have the nationality of the states that create them. *See* Craig, *Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflections on Fruehauf* v. *Massardy,* 83 Harv. L. Rev. 579, 589–92 (1970).

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[7] Nor do the Iranian Assets Control Regulations conclusively determine the effects of a possible revocation of the existing licenses for judicial proceedings on the rights of private parties *inter se.* Although § 535.805 provides that licenses "may be amended, modified, or revoked at any time," other ambiguous provisions suggest that private rights, if not public ones, may have accrued in the meantime. *See* § 535.203(c), which states that "unless otherwise provided," licenses render transactions enforceable "to the same extent" as they would be absent IEEPA. *See also* § 535.502(c), providing that unless otherwise specified, licenses do not create interests in property which "would not otherwise exist under ordinary principles of law," and § 535.402, stating that revocation of licenses, "unless otherwise specifically provided," do not affect the validity of prior actions. The reservation in these regulations of power to specify special conditions, however, may provide a sufficient warning to attachment lienors that their interests may be negated entirely. Revocation orders should attempt to destroy the attachments for all purposes, relying on the special conditions power.

American-owned and incorporated foreign branches of U.S. banks thus appear to be "subject to the jurisdiction of the United States," within the meaning of IEEPA. And the government has steadfastly maintained to date that the initial blocking orders applied to Iranian funds in these banks. As the Supreme Court has stated in a related context, such a branch bank:

> is not a separate entity in the sense that it is insulated from [its head office's] managerial prerogatives. [The New York head office] has actual, practical control over its branches; it is organized under a federal statute, 12 U.S.C. § 24, which authorizes it "To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons"—as one entity, not branch by branch. The branch bank's affairs are, therefore, as much within the reach of the *in personam* order entered by the District Court as are those of the head office.

*United States* v. *First National City Bank* [*Citibank*], 379 U.S. 378, 384 (1965). In the *Citibank* case, the Supreme Court upheld the district court's authority, in a suit by the United States to enforce a tax lien against a Uruguayan corporation, to issue a preliminary injunction against the head office of Citibank ordering it not to transfer to the corporation any corporate assets on deposit with the Montevideo branch of Citibank. The same result would follow under judicial decisions enforcing subpoenas against U.S. banks for the production of records in the hands of foreign branches. *United States* v. *First National City Bank,* 396 F.2d 897 (2d Cir. 1968); *First National City Bank of New York* v. *Internal Revenue Service,* 271 F.2d 616 (2d Cir. 1959).

Thus under domestic law IEEPA orders are effective with respect to foreign branches of American banks. These banks have already been licensed to set off amounts owed them by Iran against these accounts. Once withdrawal licenses are issued, there should be no legal impediment to Iranian withdrawal of the remaining balances of the accounts.[8]

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[8] It is possible that after withdrawal licenses are issued, creditors of Iran will attempt to attach some of these accounts through actions in foreign courts. Such an eventuality could raise jurisdictional conflicts. In an analogous context, the United States Supreme Court has assented to an executive policy of denying foreign claimants resort to formerly blocked assets, at least unless their claims related to transactions in this country. *United States* v. *Pink, supra.* International law principles of comity suggest that foreign courts would therefore allow their own domestic claimants a special priority in adjudicating rights to Iranian funds found there.

## IV. Returning the Shah's Assets to Iran

We now consider what action the President may take to assist or effect the return of the Shah's assets in the United States to Iran. Such an action might take one of a number of forms: vesting the assets in the government for administration in accordance with an international settlement; blocking the assets under IEEPA to facilitate a census and to prevent their removal; or undertaking to aid Iran in its present litigation to recover the assets, either by informing the court of our position on sovereign immunity and act of state doctrines, or by taking an assignment of the claim from Iran. We conclude that the first of these alternatives, vesting the assets, would require legislation and even then would give rise to a takings claim for just compensation. The others can be performed under present law, are likely to achieve the government's purposes, and would, we believe, be likely to survive constitutional challenge by the Shah's estate.

The question of vesting authority presents special problems. When the IEEPA was enacted in 1977, the President's authority to vest assets was confined to wartime. 50 U.S.C. App. § 5(b) (Supp. I 1977). New legislation could attempt to authorize the President to vest the Shah's assets and to administer them in accordance with settlement of the hostage crisis. However, vesting the private property of a non-enemy alien national without compensation would appear to violate the Fifth Amendment.[9] In *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481 (1931), the Supreme Court unanimously construed a statute to permit suits by non-enemy aliens for the value of ship construction contracts that the United States requisitioned under the statute (which provided for just compensation suits in cases of expropriation, but did not specify who would be entitled to sue). The petitioner, a Russian corporation, was the assignee of two construction contracts that were requisitioned, along with the ships built under them. The Government argued that Congress did not intend to protect corporations organized under the laws of a government that the United States did not recognize. The Court declined to adopt that statutory construction on the ground that such a construction would "raise a grave question as to the constitutional validity of the Act," (282 U.S. at 492), and instead held that:

> The petitioner was an alien friend, and as such was entitled to the protection of the Fifth Amendment of the Federal Constitution. Exerting by its authorized agent the power of eminent domain in taking the petitioner's property, the United States became bound to pay just compensation. And this obligation was to pay to the petitioner

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[9] A foreign nation, however, unlike a foreign national, does not have rights under the Fifth Amendment.

> the equivalent of the full value of the property contemporaneously with the taking.

282 U.S. at 489 (citations omitted).

The Supreme Court has, in subsequent cases, repeatedly indicated its continuing approval of the *Russian Volunteer Fleet* holding. *See, e.g., Guessefeldt* v. *McGrath,* 342 U.S. 308, 318 (1952). In *Clark* v. *Uebersee Finanz-Korporation,* 332 U.S. 480 (1947), the Court held that Congress' amendment of the Trading with the Enemy Act (TWEA) in 1941 to permit the seizure of any foreign asset was not intended to preclude non-enemy aliens from claiming their interests in such assets:

> It is not easy for us to assume that Congress treated all non-enemy nations, including our recent allies, in such a harsh manner, leaving them only with such remedy as they might have under the Fifth Amendment.

332 U.S. at 487–8. *See also Becker Steel Co.* v. *Cummings,* 296 U.S. 74, 79 (1935).[10]

The President's authority to block the Shah's assets under present law, in contrast to vesting them, does not seem open to serious question. The IEEPA authorizes the President to block transfers of "any property in which any foreign country or a national thereof has any interest," 50 U.S.C. § 1702(a)(1). The application of this language in the predecessor TWEA to the assets of foreign nationals was firmly established by the time of the IEEPA's enactment and has repeatedly survived constitutional challenge. *E.g., Sardino, supra,* upholding the blocking of assets of Cuban nationals. Still, an executive order blocking property of the Shah's estate in the United States would be unique in singling out the assets of one individual. Nevertheless, there seems ample justification for such an order in the prominent place in the current emergency of Iran's claim that assets in the Shah's estate are actually converted Iranian government assets.

Indeed, there is an argument that the Shah's assets in this country are presently blocked by Executive Order No. 12,170. That order blocks "all property and interests in property" of the government of Iran, and implementing regulations define "interests" and "property" in the broadest possible terms, including indirect and contingent interests. 31 C.F.R. §§ 535.311–12. Therefore, perhaps the assets claimed in Iran's suit against the Shah in New York state court are subject to the blocking order. (Certainly any assets for which Iran obtained a judgment thereupon would be blocked.) However, an interpretation of the blocking order that applied it to assets claimed by Iran in litigation would grant that nation a power to block assets in this country by asserting claims to them. In view of the implications of such an interpretation, we believe that it was not intended by the order or the regulations, and that a separate executive order blocking assets owned by the Shah's estate would be necessary. The Treasury Department could then proceed to perform a census of the assets in the normal manner.

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[10] The only authority to the contrary is Judge Friendly's dictum in *Sardino* v. *Federal Reserve Bank of New York,* 361 F.2d 106, 113 (2d Cir. 1966), *cert. denied,* 385 U.S. 898, to the effect that the right of a state to protect its nationals abroad might comprehend expropriation of property of nationals of an offending nation for compensatory purposes. *Sardino* involved blocked assets, not vested ones; this dictum has broad and quite harsh implications. We believe it to be inconsistent with the Supreme Court cases discussed in text.

An order blocking the Shah's assets would presumably be preparatory to an effort to have the Government participate in Iran's suit against the Shah in either of two ways. First, we could simply urge the court to reach the merits of the conversion claims, by filing a Suggestion of Interest that presents the Executive's position that the doctrines of sovereign immunity and act of state should not bar the court's determination of the merits. Second, the Government could urge the court to treat the merits as foreclosed in Iran's favor, so that the only remaining issue would be to identify particular assets as belonging to the Shah's estate. We would do this by presenting a Suggestion of Interest urging that under the act of state doctrine, Iranian government determinations that the Shah did convert government assets must be respected by our courts. Indeed, we could take an assignment of the Iranian claims and pursue them before the court. We will analyze these possibilities in the order presented.

In the absence of a Suggestion of Interest of the United States that alters the court's approach to sovereign immunity and act of state doctrines, it may fail to reach the merits of Iran's case. The complaint alleges that the Shah was the *de facto* ruler and head of state of Iran from 1941 until January 1979. The acts complained of are alleged to have taken place in Iran during the period that the Shah was the ruling monarch, and therefore would ordinarily constitute acts of state.

An argument can also be made that the Shah's estate enjoys sovereign immunity from suit.[11] The 1976 Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.*, does not expressly address the privileges and immunities of heads of state, but talks only in terms of "foreign states." Nevertheless, Restatement (Second) of the Foreign Relations Law of the United States, § 66 (1965), states that the immunity of a foreign state recognized in § 65 extends to "its head of state and any person designated by him as a member of his official party." Thus, it is arguable that a former head of state enjoys the immunities of a "foreign state" as codified in the Act.[12] Alternatively, if the Act were construed

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[11] In *Hatch* v. *Baez*, 14 N.Y. (7 Hun) 596 (1876), the court held that the acts while in office of a former head of state were immune from judicial scrutiny in a suit brought by a private claimant, not his former government. The court's decision is phrased in terms suggestive of both act of state and sovereign immunity doctrines.

[12] Section 1605(a)(5) preserves the immunity of foreign states from suit with respect to—

Continued

not to apply to heads of state, the Shah might be entitled to immunity under generally recognized doctrines of customary international law. *See* 1 Oppenheim's International Law 676 ff. (Lauterpacht ed., 1953).

Since either act of state or sovereign immunity doctrines may defeat Iran's claims against the Shah if applied in this case, it is important to consider whether the present Iranian government may waive the application of these doctrines to the acts of its predecessor. We have found no authority on point. As an *a priori* matter, it seems that Iran might be able to waive the doctrines.[13] Both doctrines exist for the benefit of the state in question, not for the individuals who lead it. Therefore it seems incongruous to apply the doctrines to defeat a claim by a state for its own assets converted by a former monarch. Since the question of the waivability of these defenses by a present government against a former head of state is an open one, a Suggestion of Interest indicating that the Executive favors reaching the merits might be especially persuasive in court, although it is unlikely to prove conclusive.[14]

A more conclusive impact on the merits might follow an Iranian decree nationalizing the Shah's assets, and either a Suggestion of Interest by the United States, urging that it be honored, or a full-scale assignment of the Iranian claims to the United States pursuant to an executive agreement. Such an assignment should allow our government to recover the assets, under *United States* v. *Belmont*, 301 U.S. 324 (1937), which held that a foreign country's expropriation decree directed at that country's corporations must be deemed by a U.S. court to have validly vested title to the expropriated assets in the foreign government. The United States sued in *Belmont* to recover funds that a Russian corporation, prior to nationalization, had deposited with a New York banker. The United States claimed these funds under the Litvinov Assignment. The Court held that our recognition of the U.S.S.R. impliedly recognized as valid that nation's expropriation decrees, and that the U.S. claim for the expropriated assets did not constitute a taking of private property under the Fifth Amendment:

> The public policy of the United States relied upon as a bar to the action is that declared by the Constitution, namely, that private property shall not be taken without

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(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

The tortious and wrongful acts alleged in the complaint would probably fall within the above provisions of the Act.

[13] Analogy may be taken to the pattern of diplomatic immunities and their waiver. Under the Vienna Convention on Diplomatic Relations, the sending state may waive a diplomat's immunity (art. 32). Absent waiver, however, immunity for the exercise of official functions subsists after the diplomat's appointment has terminated (art. 39.2).

[14] The effect in New York courts of Suggestions of Interest by the United States regarding these issues is discussed at length in our memorandum of January 2, 1980, to the Acting Associate Attorney General [p: 160 *supra*].

> just compensation. But the answer is that our Constitution, laws and policies have no extraterritorial operation, unless in respect of our own citizens. What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled.

301 U.S. at 332 (citation omitted). No suggestion appears in *Belmont* that the constitutionality of the United States government's "taking" depended at all on the payment of compensation to Russian nationals by this government or by that of the U.S.S.R. *See also United States* v. *Pink*, 315 U.S. 203 (1942). Thus it appears that an assignment can avoid the constitutional perils of vesting—the *Russian Volunteer Fleet* case was cited with approval in *Belmont*.

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# Congressional Power to Provide for the Vesting of Iranian Deposits in Foreign Branches of United States Banks

**Congress has the power under Article I, § 8 of the Constitution to authorize the peacetime vesting of assets of a foreign government in the control of foreign branches of American-owned and incorporated banks, at least insofar as such power may be enforced by courts of the United States.**

**The Just Compensation Clause of the Fifth Amendment does not prohibit the United States from effecting uncompensated seizures of the assets of foreign nations.**

**While United States courts will ordinarily make every effort to construe statutes to accord with our treaty obligations and general international law principles, Congress may, by clearly expressing its intent to do so, legislate in derogation of international law or contrary to prior treaty obligations. Therefore, a United States court would likely enforce a vesting order directed at overseas deposits of a foreign government that was clearly authorized by Congress notwithstanding contrary treaties or principles of international law.**

**Congress could provide for the seizure in this country of Iran's overseas deposits by permitting vesting orders to be served against the New York office of the banks involved; however, foreign courts may refuse to give effect to what would appear to be the United States' uncompensated extraterritorial appropriation of non-enemy assets in any suit brought by Iran to recover its deposits.**

September 16, 1980

## MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This memorandum considers Congress' power to provide for the vesting by the United States of currently blocked Iranian U.S. dollar deposits [1] in the foreign branches of United States banks. We analyze, first, Congress' power *per se* to authorize such a seizure, and second, the problems that Congress would face in providing for the vesting of the Iranian deposits in a feasible and effective manner. We believe Congress has the power to authorize this vesting, but that the vesting of Iran's deposits might ultimately subject the United States to liability under the Fifth Amendment for compensating the banks if they are successfully sued by Iran in foreign courts.

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[1] For convenience, we refer in this memorandum to the government of Iran, its instrumentalities and controlled entities, and the Central Bank of Iran, collectively, as "Iran," and the interest of the government of Iran in the deposits of any of these entities as "Iran's deposits." Unless otherwise specified, we intend the term "Iran's deposits" to refer to Iran's U.S. dollar deposits in the foreign branches of U.S. banks.

## I.

In response to events in Iran, the President, on November 14, 1979, issued Executive Order No. 12,170, 3 C.F.R. 457 (1979), declaring a national emergency and ordering the blocking of:

> all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States or which are in or come within the possession or control of persons subject to the jurisdiction of the United States.

Within hours of the President's order, the Department of the Treasury issued implementing regulations, the Iranian Assets Control Regulations, 44 Fed. Reg. 65,956 (1979), *to be codified at* 31 C.F.R. § 535, blocking the transfer to Iran of any property covered by Executive Order No. 12,170. These assets include deposits of dollars in the foreign branches of U.S. banks, principally in London and Paris.

Whether Congress has the legislative power *per se* to provide for the United States to "vest" or seize these blocked overseas deposits depends on three elements: congressional power to legislate concerning the subject matter; Congress' power to regulate the behavior of the foreign branches of U.S. banks; and the absence of any constitutional prohibition against this vesting. If these elements obtain, then Congress would have authority to provide for the vesting of Iran's deposits, at least as that authority can be recognized and would be enforced by U.S. courts.

We do not think a serious question exists as to Congress' constitutional power to legislate with respect to the assets of a foreign government in the control of U.S. persons. The constitutionality of the only legislative vesting authority now extant—war-time vesting authority under the Trading with the Enemy Act (TWEA), 50 U.S.C. App. § 1 *et seq.*—has been upheld as part of Congress' powers with respect to the conduct of war, *Stoehr* v. *Wallace*, 255 U.S. 239 (1921), and we are aware of no judicial decision that specifies a particular source of congressional power to authorize the vesting of non-enemy assets in peacetime. The United States has, however, apparently without judicial challenge, vested a steel mill belonging to Czechoslovakia, a country with which we were not at war, in order to settle claims against that country. International Claims Settlement Act of 1949, 22 U.S.C. §§ 1642–1642p. In addition, Congress has provided authority since 1933 that would permit at least the freezing of foreign non-enemy assets in national emergencies other than war, *e.g.*, International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701–1706 (Supp. I 1977). Such legislation—which would seemingly have to rest on legislative subject-matter authority sufficient to encompass legislation authorizing the seizure of those same assets—has been upheld in the courts. *See Nielsen* v. *Secretary of the Treasury,* 424 F.2d 833 (D.C. Cir. 1970), and *Sardino* v. *Federal Reserve Bank of New York,* 361 F.2d 106 (2d Cir.), *cert. denied,* 385 U.S. 898 (1966), both dealing with the Cuban Assets Control Regulations, 31 C.F.R. § 515 (1979).[2] We infer from this history that Congress' power to regulate commerce with foreign nationals, U.S. Const., Art. I, § 8, cl. 3, alone or together with Congress' other Article I, § 8 powers, would provide it with power sufficient to legislate concerning the vesting by the United States in peacetime of Iranian assets in the possession or control of U.S. persons.

In addition, insofar as vesting would constitute legislative control of the activities of the overseas branches of U.S. banks, the overseas location of these branches is not a bar to legislation. The United States has authority to exercise jurisdiction over its nationals abroad. *Blackmer* v. *United States,* 284 U.S. 421 (1932) (upholding contempt against U.S. citizen residing in France for failure to respond to D.C. Supreme Court supoena); *Cook* v. *Tait,* 265 U.S. 47 (1924) (upholding tax levied against non-resident U.S. citizen for income from property located outside the United States). Although international law principles are unsettled for determining the nationality of corporations, the generally accepted U.S. rule is that corporations have the nationality of the states that create them. *See* Craig, *Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflections on Fruehauf* v. *Massardy,* 83 Harv. L. Rev. 579, 589–92 (1970) (hereafter *Craig*). Were Congress to express its intent specifically to treat as "United States persons" American-owned and incorporated foreign branches of U.S. banks, its determination would be upheld in the courts. As the Supreme Court has stated in related context, such a branch bank:

> is not a separate entity in the sense that it is insulated from [its head office's] managerial prerogatives. [The New York head office] has actual, practical control over its branches; it is organized under a federal statute, 12 U.S.C. § 24, which authorizes it "To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons"—as one entity, not branch by branch. The branch bank's affairs are, therefore, as much within

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[2] In 1964, Congress amended the International Claims Settlement Act of 1949 to authorize the vesting of Cuban assets frozen under the Cuban Assets Control Regulations. Pub. L. No. 88-666, 78 Stat. 1110. Congress, however, repealed this vesting authority, which had not been employed, the following year, Pub. L. No. 89-262, 79 Stat. 988 (1965), because the Johnson Administration urged that the vesting and sale of Cuban property would jeopardize our encouragement of foreign investment in the United States and the protections afforded by other nations to U.S. assets abroad. S. Rep. No. 701, 89th Cong., 1st Sess. 3 (1965). The State Department had, in fact, opposed the passage of vesting authority in the first place, but, although this Department deferred to State regarding support for the bill, this Office specifically opposed any language in the signing statement casting doubt on the constitutionality of the law.

> the reach of the *in personam* order entered by the District Court as are those of the head office.

*United States* v. *First National City Bank* [*Citibank*], 379 U.S. 378, 384 (1965). In the *Citibank* case, the Supreme Court upheld the district court's authority, in a suit by the United States to enforce a tax lien against an Uruguayan corporation, to issue a preliminary injunction against the head office of Citibank ordering it not to transfer to the corporation any corporate assets on deposit with the Montevideo branch of Citibank. The same result would follow under judicial decisions enforcing subpoenas against U.S. banks for the production of records in the hands of foreign branches. *United States* v. *First National City Bank,* 396 F.2d 897 (2d Cir. 1968); *First National City Bank of New York* v. *Internal Revenue Service,* 271 F.2d 616 (2d Cir. 1959).

Finally, we note that the Constitution does not prohibit the uncompensated seizure of the assets of foreign governments. The Fifth Amendment provides that no "private property [shall] be taken for public use, without just compensation." On its face, the textual reference to private property excludes foreign governments from the protection of the Just Compensation Clause. The role of the Constitution in domestic law buttresses this reading. Constitutional protections limit the power of the United States to act upon persons who are subject to its legal authority by virtue of their citizenship or presence in this country. The United States, however, asserts its powers with respect to foreign nations not by virtue of its domestic political authority, but because, as a sovereign nation among equals, it enjoys powers and privileges under international law. Conversely, the rights of foreign states in this country depend not on constitutional protections, but on treaties, international custom, and such privileges as this nation extends under principles of comity. *Cf. Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964).

It may be argued that the peacetime seizure by the United States of Iranian assets would violate particular treaties or general principles of international law. It should be noted, however, that, even under such circumstances, Congress' express determination to authorize peacetime vesting would be enforceable in U.S. courts. Although our courts will ordinarily make every effort to construe statutes to accord with our treaty obligations and general international law principles, *McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10, 21–2 (1963); *Lauritzen* v. *Larsen,* 345 U.S. 571, 578 (1953), Congress may, by clearly expressing its intent to do so, legislate in derogation of international law or contrary to prior treaty obligations. *Rainey* v. *United States,* 232 U.S. 310 (1914); *Whitney* v. *Robertson,* 124 U.S. 190 (1888). In sum, insofar as such power may be enforced by U.S. courts, we conclude that Congress does have the power to authorize the vesting of Iranian dollar deposits in the foreign branches of U.S. banks.

## II.

Should Congress attempt to draft legislation authorizing the seizure of the Iranian deposits, it would face additional critical questions in attempting to provide for a feasible and effective vesting procedure. Whether vesting could be made feasible, in short, depends upon whether vesting could be effected by the Executive with the sole assistance of United States courts, or whether the assent of the courts of those nations in which Iran's deposits are located would also be required to secure transfers of title. Iran probably will seek injunctive relief in foreign courts to prevent the seizure of Iranian assets, and the banks, in any event, might seek declaratory judgments abroad authorizing their compliance with the vesting orders. Such suits would, of course, involve jurisdictional conflicts of the first order, and foreign courts might well refuse to give effect to what, from their point of view, would appear to be the United States' uncompensated extraterritorial expropriation of non-enemy assets, in possible disregard of general principles of international law. The United States Supreme Court has already expressed this country's judicial policy of not giving effect to foreign government's uncompensated expropriations of assets located in the United States. *Alfred Dunhill of London, Inc.* v. *Republic of Cuba,* 425 U.S. 682, 686–87 (1976). *Cf. Fruehauf* v. *Massardy,* (1968) D.S. Jur. 147, (1965) J.C.P. II 14,274bis (Cour d'appel, Paris), discussed in *Craig, supra.*

A strong argument can be made, however, that Congress can lawfully provide for the seizure in this country of the overseas deposits by permitting the vesting orders to be served against the head offices of the banks involved, which are located in New York. Foreign branches of U.S. banks and the U.S. head offices of those banks may, of course, be treated as separate entities under state law. *Sokoloff* v. *National City Bank of New York,* 239 N.Y. 158, 145 N.E. 917 (1924). Congress, however, may provide that national banks and their foreign branches shall be treated as unified entities for purposes of federal law. *See* the *Citibank* cases, discussed *supra.* That the New York head offices of the banks holding Iran's overseas deposits have actual control of those deposits is strongly suggested by the arrangements through which such deposits are made and controlled.

First, although individual deposits may have differed in their details, the deposits in question typically did not involve any transfer of currency overseas to any foreign branch of a U.S. bank. The only transfers of funds occurred in New York when funds owed to Iran or being held for Iran by banks other than Iran's depository bank were transferred to the head office of the depository bank in New York. Upon such transfer, the head office would direct one of its overseas branches to credit Iran with a deposit in the overseas branch equal to the amount of the transfer. The head office, in turn, would credit the transferred funds to a "cover account" in the name of its foreign branch to secure the foreign branch's obligation to repay Iran on demand overseas for the amount on deposit.[3] An advantage of this scheme for Iran appears to have been that it enabled Iran to keep funds on deposit in interest-bearing checking accounts abroad, which would not have been possible in the United States, while at the same time keeping the funds available to a New York bank to finance Iran's transactions here.

Further, it appears, at least in certain instances, that head office banks in New York could draw, in New York, on Iran's foreign branch deposits for the benefit of Iran. We understand that, for example, if directions from Bank Markazi or the National Iranian Oil Company to Chase Manhattan's head office to make particular payments resulted in an overdraft, the head office—without further notice or its depositor's further consent—could cover the overdraft by withdrawing funds from the depositor's London account. It is even possible in theory that, in some cases, Iran and its banks agreed that the deposits *in toto* would be repayable to Iran on demand in New York.

These facts would readily justify a decision by Congress to treat Iran's overseas deposits in the foreign branches of U.S. banks as being within the control of, and therefore "present" in, the U.S. offices of those banks as well. It is the ordinary rule that a debt follows the debtor and, insofar as a national bank and its foreign branches are all one entity, that bank, as a debtor to its depositors, is present both here and overseas. The Supreme Court expressly recognized the possibility of dual-situs debts in *Cities Service Co.* v. *McGrath*, 342 U.S. 330 (1952). In that case, the Court unanimously upheld, under the Trading with the Enemy Act, the vesting of two gold debentures issued by Cities Service Company, a U.S. corporation, although one debenture was located outside the United States. The Supreme Court said:

> [T]he obligor . . . is within the United States and the obligation of which the debenture is evidence can be effectively dealt with through the exercise of jurisdiction over that petitioner.

342 U.S. at 334. In our judgment, the exercise of jurisdiction over national banks in the United States to seize debts to Iran that are evidenced by bank records abroad would present a precisely analogous case, and would equally "transgress[ ] no constitutional limitation[ ] on [Congress'] jurisdiction." *Id.*

The seizure in the United States of Iran's overseas bank deposits would, of course, not forestall attempts by Iran in foreign courts to recover its deposits. Although this country's ability to provide the banks with a complete defense to such actions would be enhanced if Iran's deposits were seized within U.S. territory, we understand that the legal disputes would be heated. At least three core issues would be involved in any overseas suits that Iran would bring to recover its deposits:

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[3] Although no reported judicial decision is definitive on this point, it appears from those cases involving "cover accounts" such as these that the original depositor has no ownership interest in the cover accounts. If so, it would not be useful for the United States to seize the cover accounts. *See Schrager-Singer* v. *Attorney General of the United States*, 271 F.2d 841 (D.C. Cir. 1959).

> 1. Whether the foreign situs nations should excuse performance of the branch banks' obligations because elements of performance would be required in the United States and U.S. law will have rendered those elements impossible to perform;
>
> 2. Whether the foreign courts should recognize the validity of U.S. vesting as consistent with their nations' public policy both specifically with respect to Iran and generally with respect to commonly accepted principles of international law; and
>
> 3. Whether the foreign courts should recognize the validity of U.S. vesting as a matter of comity.

In arguing for the validity of its vesting, the United States would likely assert the United States' predominant interest in the operation of the branch banks, the involvement of paramount U.S. foreign policy and national security concerns, foreign condemnation of the Iranians' actions, the hardship that foreign enforcement of the banks' obligations would pose for the banks and for the international monetary system, and the acceptability of reprisal under international law. The most serious doubts exist, however, as to whether these arguments would prevail in a foreign forum. Foreign courts might well view the banks' obligations as wholly performable abroad. They might perceive that their own nations' interests are significantly at stake in being able to assure foreign depositors the security of their deposits. The courts might fear that the U.S. vesting itself would destabilize the world monetary system, and would recognize that the United States would not likely give effect to other nations' extraterritorial seizures of property in the United States. How foreign courts would reconcile these competing considerations in suits by Iran is at best uncertain.

In this connection, we think you should be aware that seven of the nine Justices deciding *Cities Service Co.* v. *McGrath, supra,* conditioned their judgment regarding the constitutionality of this country's seizure here of the overseas gold debentures on the obligor's implicit right under the Fifth Amendment to recoup from the United States the extent of any liability imposed abroad in connection with the seized obligation.[4] 342 U.S. at 333–36. We believe the same result would likely obtain if Iran were to succeed, subsequent to our vesting, in a foreign suit against the banks for the recovery of Iran's deposits. The banks would be able to involve sympathetically the Supreme Court's recognition that the "Fifth Amendment's guarantee . . . [is] designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States,* 364 U.S. 40, 49 (1960).

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[4] The remaining two Justices would have reserved the question. 342 U.S. at 336.

JOHN M. HARMON
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*Office of Legal Counsel*

# Presidential Authority to Permit the Withdrawal of Iranian Assets Now in the Federal Reserve Bank

**In order to allow Iran to withdraw its assets in the Federal Reserve Bank, the President has the power, under the International Emergency Economic Powers Act (IEEPA), to nullify existing attachments licensed under the Iranian Assets Control Regulations. Since in consenting to attachments against the blocked Iranian assets the Government reserved the right to revoke its consent at any time, their nullification does not constitute a compensable taking of private property.**

**The Federal Reserve Bank may release Iranian assets which have been attached but are not yet subject to a licensed final judgment, in reliance on the Presidents' action under the IEEPA, without applying to the court to vacate its attachment orders. The considerations which ordinarily mandate compliance with court orders would not justify a contempt citation where the conduct in question has been clearly mandated by supervening executive action, where compliance would defeat the President's exercise of his emergency power under the IEEPA, and where the IEEPA itself provides an express exception to contempt liability for compliance with an order issued under its authority.**

**Where Congress has immunized good faith compliance with a presidential order issued under the IEEPA, the Federal Reserve Bank would not be held liable to disappointed attachment creditors even if the presidential orders nullifying the attachment orders were later held unlawful. Nor is there any basis, in the Constitution or otherwise, on which creditors whose attachments were nullified would be likely to recover against the United States itself.**

October 8, 1980

## MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This responds to your request for our opinion whether the President has authority to permit the Central Bank of Iran and the Bank Markazi to withdraw the blocked assets they now have on deposit with the Federal Reserve Bank (FRB) notwithstanding the outstanding orders of attachment entered against such assets. You have also asked whether it is necessary to approach the courts that have entered the orders of attachment and obtain orders of dissolution before transferring the funds. We have concluded that the President has the authority under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701 *et seq.* (Supp. I 1977), to return those assets by revoking the existing licenses for attachments against them and by licensing withdrawals. It is our view that such action is sufficient as a legal matter to authorize the return of those assets. Moreover, it is our opinion that the Federal Reserve Bank, relying upon that authority, may release the assets without applying to the court to vacate the attachment orders. We believe it would be an abuse of discretion for a court to use the contempt power to penalize noncompliance with an attachment order that has been rendered unenforceable by the President's order. Finally, Congress has immunized good faith compliance with emergency orders issued under IEEPA; therefore, it is our opinion that the Federal Reserve Bank could not be held liable to the attachment creditors for damages even if a court should later determine that the President's order was beyond the scope of his power under IEEPA. Similarly, we have found no basis for any action for damages by the attachment creditors against the United States.

### I. Presidential Authority to Nullify Outstanding Attachments

Under IEEPA, the President has broad powers to issue orders blocking or releasing Iranian assets.[1] Pursuant to that power, the President issued Executive Order No. 12,170 on November 14, 1979, blocking all property subject to the jurisdiction of the United States in which the government of Iran or any of its instrumentalities had an interest. 3 C.F.R. 457 (1979). The order also delegated to the Secretary of the Treasury presidential authority under IEEPA to implement the blocking order. On the same day, the Treasury Department issued the first of its Iranian Assets Control Regulations (IACR), which provided in part (31 C.F.R. § 535.203(e)):

> Unless licensed or authorized pursuant to this part any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property in which on or since the effective date there existed an interest of Iran.

On November 19, 1979, § 535.805 was added, providing that any licenses or authorizations "may be amended, modified or revoked at any time." A limited modification to the general ban on unlicensed judicial proceedings was made subsequently on November 23, 1979, with the adoption of § 535.504, which authorized judicial proceedings but continued the ban on judgments and payments from blocked accounts. And finally, on December 18, 1979, an interpretive rule was added to clarify the permissible scope of judicial action (§ 535.418 (1980)):

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[1] The IEEPA's principal operative provision, § 1702(a)(1), provides that the President may:

(A) investigate, regulate or prohibit—

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,

(iii) the importing or exporting of currency or securities; and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest. . . .

> The general authorization for judicial proceedings contained in § 535.504(a) includes pre-judgment attachment. However, § 535.504(a) does not authorize payment or delivery of any blocked property to any court, marshal, sheriff, or similar entity, and any such transfer or blocked property is prohibited without a specific license. It would not be consistent with licensing policy to issue such a license.

All of the attachment orders entered against the Iranian assets held by the Federal Reserve Bank exist pursuant to Treasury's general license. In order to effect Iran's withdrawal of the assets in the FRB, we believe the President has the power to nullify the licensed attachments by revoking the existing general licenses for attachments.

While there is no case law addressing the President's power under IEEPA to nullify attachments issued under a licensing scheme such as the one presently in effect under the IACR, we believe that *Orvis* v. *Brownell*, 345 U.S. 183 (1953), provides strong support for the general principle that the President may, under IEEPA, condition his consent to the creation of property interests in blocked property and, by invoking those conditions, nullify such property rights. In *Orvis*, claimants in a New York court attached a credit, previously frozen by executive order, which had been owed to Japanese nationals by a stock association. The claimants obtained a judgment and, as required by regulation, applied for a federal license to permit the stock association to pay over the amount in judgment. The application was denied, and the Custodian vested the credit and received payment from the stock association. The judgment creditors, asserting that they had a right to the funds, filed an action under § 9(a) of the Trading with the Enemy Act, after the Custodian denied their notice of claim to those funds.

The Supreme Court, in rejecting the judgment creditors' § 9(a) claim, noted that the government had consented to the unlicensed attachment of the funds for the limited purpose of determining the rights and liabilities between the creditors and the enemy debtors.[2] The Court

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[2] Prior to the attachment in *Orvis*, Treasury had issued a general ruling that any unlicensed transfers, including attachments, were null and void. Department of Treasury Ruling No. 12, § 131.12, 7 Fed. Reg. 2991 (1942). Paragraph 4 of the ruling, however, recognized unlicensed transfers, including attachments, as valid and enforceable for the purpose of determining the rights and liabilities of the parties to the action. One day after the issuance of the ruling, Treasury announced its position with respect to unlicensed attachments in an *amicus curiae* brief in the New York Court of Appeals, stating that unlicensed attachments were desirable to clarify the rights and liabilities of private parties. Brief of the United States as *amicus curiae* at 52, 53 *Commission for Polish Relief* v. *Banca Nationala a Rumaniei*, 288 N.Y. 332, 43 N.E. 2d 345 (1942), *quoted in Zittman* v. *McGrath*, 341 U.S. 446, 454–57 (1951) (*Zittman I*). Nine years later in *Zittman I*, the Court relied on Treasury's administrative practice and interpretation of Ruling No. 12 to deny Treasury's request that an attachment obtained in state court against blocked German bank accounts be declared null and void and decided that the attachment was valid between the private parties to the action. Accordingly, the Court held that an order of the Custodian vesting the "right, title and interest" of the German banks placed the Custodian in the shoes of the German banks and, therefore, subject to the attachment. In a companion case, *Zittman* v.

Continued

held, nonetheless, that the government's permission to attach the credit in state court proceedings created no property interest that could be asserted against the government because the government had reserved the right to withhold licenses for judgment. The Court reasoned that the government's initial consent to proceed with state court attachments

> did not extend so far as to recognize them as effecting a transfer. To so interpret it *would ignore the express conditions on which the consent was extended.* Realistically, these reservations deprive the assent of much substance; but that should have been apparent on its face to those who chose to litigate. The opportunity to settle their accounts with the enemy debtor was all that the permission to attach granted.

*Id.* at 187 (emphasis added).

Three important principles emerge from a careful analysis of *Orvis.* First, the President has the power under IEEPA[3] to prevent the creation of property interests in blocked alien property. Second, this power includes the power to reserve the right to withdraw any consent he may give to the creation of property rights or to condition the exercise of any property right created pursuant to his consent. Third, this power to reserve the right to withdraw consent or condition the exercise of property rights is paramount and supersedes any rights creditors may acquire under state law.

Application of these principles to the release of Iranian assets held by the FRB leads to the conclusion that the President has the power under IEEPA to nullify the attachments against those assets. Treasury, as the President's delegee, has consented to attachments against the blocked Iranian assets. 31 C.F.R. § 535.504 and 535.418. In giving its consent, Treasury reserved two crucial rights. Treasury withheld its consent to

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*McGrath,* 341 U.S. 471 (1951) (*Zittman II*), the Court held that the Custodian's order, without such restrictive language, directing that certain German bank accounts previously attached by creditors be turned over was valid. Since the Custodian had sought only possession of the funds and, unlike *Zittman I,* had not asked for a judgment declaring the attachments to be invalid, the Court addressed only the question whether the Custodian had the power to possess and administer those funds. The Court expressly reserved the question whether the state court judgments and attachments would have any conclusive effect on the final disposition of the accounts. *Id.* at 474. That question was decided in the negative two years later in *Orvis.*

[3] The case law under the Trading with the Enemy Act as amended in 1941, is fully applicable to our analysis of the President's authority under its successor statute, IEEPA. As the legislative history of IEEPA notes, the "grant of authorities [in IEEPA] basically parallels section 5(b) of the Trading with the Enemy Act." H. R. Rep. No. 459, 95th Cong., 1st Sess. at 14–15 (1977). Indeed, because the blocking order in *Orvis* was issued prior to the 1941 amendments to the Trading with the Enemy Act, which added *inter alia* the powers to nullify or void any interest in alien property, it could be strongly argued that the President's powers to nullify or void the attachments against the locked assets are even greater than the powers of the President when the *Orvis* blocking order was issued. Not only does the President have the power recognized in *Orvis* to condition the creation of property interests and to nullify said interests by invoking the stated conditions; he arguably also has the power to nullify or void any interest in blocked property even in the absence of any stated conditions or reservations. The exercise of that power, however, may raise a substantial "takings" question under the Fifth Amendment.

judgment, a reservation which *Orvis* regarded as permitting the government to nullify any attachments vis-a-vis itself. Treasury also reserved the right to revoke its consent to attach at any time. 31 C.F.R. § 535.805.[4] Thus, the government reserved not only the right to nullify attachments vis-a-vis the government, but also the right to nullify them totally.[5] This latter reservation was critical in order to ensure that the President would have maximum flexibility in negotiating with Iran for the release of the hostages. Because the license to attach was subject to these reservations, the attaching creditors in initiating attachments proceedings assumed the risk that the license to attach would be withdrawn at any time. But, like the attachment creditors in *Orvis,* that risk "should have been apparent on its face to those who chose to litigate." 345 U.S. at 187.

### II. Judicial Dissolution of Attachment Orders

We have concluded that the President has authority under IEEPA to prevent the continuing assertion of interests in Iranian property through the provisional remedy of attachment. The President may exercise that authority by issuing an order prescribing that attachments shall create no interests in Iranian property. Moreover, with respect to any pending litigation involving Iranian property already subject to attachment but not yet subject to a licensed final judgment, the President may provide (1) that the plaintiff shall no longer enjoy provisional rights in the property through attachment, and (2) that the garnishee may lawfully transfer the property notwithstanding the plaintiff's attempt to secure it pending final judgment.

We now come to a procedural issue. If the President promulgates an order that (1) prevents the continued assertion of provisional rights through pending attachment orders and (2) authorizes garnishees to transfer Iranian property notwithstanding attempts to secure it through attachment, may garnishees assume that the President's action, if intended to do so, leaves them legally free to proceed directly with any authorized transfer, or must the garnishees apply first to the appropriate court or courts for orders formally vacating the attachments?

In ordinary circumstances, the general interest in preserving orderly judicial process would militate strongly in favor of the latter course. Procedures are provided by law for the modification or dissolution of court orders that stand in need of modification or dissolution because of changed circumstances. Such procedures are available here. *See* N.Y. Civ. Prac. Law § 6223 (McKinney 1980). Ordinarily, these procedures provide an adequate means of obtaining relief from court orders that have been rendered void or unenforceable by a change in law. *See generally Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976). Moreover, from a purely pragmatic standpoint, the use of these procedures in the present case would avoid the two risks presented by the alternative course—namely, (1) the risk that action in defiance of an undissolved attachment order will be regarded as contumacious and punishable as contempt, and (2) the risk the courts may yet hold the attachments lawful and the garnishee liable civilly for any damages suffered by the plaintiffs in consequence of violation of the attachment orders.[6] We will assess both of those risks below.

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[4] In § 535.503, Treasury also reserved the right to exclude any person from the operation of any license or "to restrict the applicability [of any license] with respect to particular persons, transactions or property or classes thereof." Thus, Treasury reserved the right not only to revoke all licenses for attachments, but also to revoke selectively particular classes of licenses, *e.g.*, all general licenses for attachments against blocked assests held by the Federal Reserve Bank.

[5] Because of the reservation of the right to revoke these attachments, it is clear that they can be revoked under IEEPA without giving rise to a successful takings claim. *See, e.g., Bridge Co.* v. *United States,* 105 U.S. 470 (1881); *United States* v. *Fuller,* 409 U.S. 488 (1973).

### *A. Contempt*

Our research to date has revealed only one decision by the Supreme Court dealing with the precise question presented here. *See Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855). In *Wheeling* the Court was asked to decide whether certain individuals should be held in contempt of an order that the Court itself had issued enjoining construction of a bridge over the Ohio River. Congress had subsequently enacted a statute declaring that this bridge was a lawful structure. The defendants, in reliance upon that Act, had proceeded with construction of the bridge without first applying to the Court for dissolution of the outstanding injunction. On the motion for contempt, the Court held that the Act of Congress was valid, that the previous injunction could not be enforced *in futuro*, that the motion for contempt was addressed to the discretion of the Court, and that under all the circumstances of the case the motion should be denied.

*Wheeling* does not hold that a court is powerless to punish defiance of an outstanding court order that has been rendered unenforceable by subsequent legislation. Indeed, the implication of the decision is to the contrary; and in that respect the decision is fully consistent with the settled rule, applicable in a different context, that the contempt power may be used to punish noncompliance with court orders that are erroneous or unlawful at the time they are issued. *See United States* v. *United Mine Workers of America*, 330 U.S. 258 (1947); *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967). The Supreme Court has deemed this to be a necessary rule, given the need for a means of enforcing compliance with orderly process. The courts must be able to ensure that aggrieved litigants will appeal erroneous orders and not resort to self-help. Nonetheless, it is our view that *Wheeling* does stand for the proposition that the usual considerations supporting the rule of compliance do not justify a contempt citation where the conduct in question has been clearly mandated or authorized by subsequent legislation.[7] To be sure, the rule of compliance is not suspended by any and every change in circumstance, *see Spangler, supra;* but *Wheeling* suggests that it may be suspended by a clear and specific change in law.

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[6] It goes without saying that the executive's belief in the legality of any given executive action in response to the hostage crisis will not in itself prevent a court from deciding that the action is or was unlawful. If the underlying issue is justiciable and can be brought before a court with jurisdiction to decide it, there is always the risk that the court will rule against the Government.

In our opinion, the case at hand is an appealing case for application of the *Wheeling* rule. It is more appealing than was *Wheeling* itself. The builders of the bridge over the Ohio could have easily applied for dissolution of the injunction before resuming their work; yet the Court thought it inappropriate to hold them in contempt for boldly proceeding in the face of the outstanding order. This result cut against the traditional policy. The demand for compliance with orderly process has generally rested upon the assumption that existing procedures for the modification or correction of outstanding orders will be adequate to the exigencies of the case, that they will fully vindicate the rights in question, and that individuals can therefore be expected to comply with them without resorting to self-help. At the same time, the courts have recognized that in unusual cases the usual procedures may be inadequate; and in these cases the courts have been willing to countenance refractory conduct that would be held contumacious in other contexts. For example, where the rights of an individual would be wholly lost by complying with an outstanding order, his refusal to comply with it pending appeal is not punishable as contempt. There is no justification for requiring aggrieved litigants to comply with procedures that defeat the right at issue. *See United States* v. *Dickinson*, 465 F.2d 496, 511–12 (5th Cir. 1972), *citing Walker* v. *City of Birmingham, supra, Malloy* v. *Hogan*, 378 U.S. 1 (1964), *Gelbard* v. *United States*, 408 U.S. 41 (1972).

As we have said, Congress has given the President emergency power to nullify these attachments and to authorize transfer of the attached property. The President may attempt to use that power to resolve the hostage crisis. If, however, the government and the banks, to implement his order, must first pursue the usual judicial procedure for modification of outstanding attachments (a procedure involving motions, arguments, further litigation, and inevitable delay), then the President may be unable to use his power effectively to achieve the purpose authorized by Congress. If settlement of the crisis requires expedition and certainty, not uncertainty and the law's delay, we believe it would be an abuse of discretion for a court to use the contempt power to penalize noncompliance with an attachment order that has been rendered unenforceable by lawful action under IEEPA. Continuing compliance with the order, followed by a motion for dissolution, argument, and further litigation, would defeat the emergency power that Congress has sought to create.

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[7] We do not believe our reliance on *Wheeling* is undercut by the evident distinction between supervening congressional action and supervening executive action taken under authority conferred by a preexisting statute (IEEPA). We believe that the assertion of supervening power under IEEPA would be entitled to as much respect by the judicial branch as supervening action by Congress.

Finally, we observe that IEEPA itself provides that "[n]o person shall be held liable in any court for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, this [Act], or any regulation, instruction, or direction issued under this [Act]." 50 U.S.C. § 1702(a)(3). Without expressing any view regarding the general question of the power of Congress to deprive the courts of a means of enforcing compliance with their own process, we are of the opinion that, in the face of this expression of congressional intent, the use of the contempt power to punish necessary and otherwise lawful action under IEEPA would be an abuse of discretion, and, therefore, unlikely. We have found one state court case, involving the Trading with the Enemy Act and the Federal Reserve Bank of New York, that supports this conclusion. *See Von Opel* v. *Von Opel*, 154 N.Y.S. 2d 616 (Sup. Ct. 1956). We have found no decision to the contrary.

### *B. Civil Liability*

The second risk of proceeding in the face of outstanding attachment orders is the risk of civil liability. If the attached funds are released *before* the courts have determined that the President has power to nullify the attachments, the United States, the Federal Reserve Bank or both will almost certainly be asked to account to the creditors for any damages they sustain as a result of the release. If the courts ultimately decide (1) that IEEPA does not authorize the President to nullify these attachments and (2) that the attachments are otherwise valid under the Foreign Sovereign Immunities Act (FSIA), the question will arise whether the courts can go further and hold either the United States or the Federal Reserve Bank accountable to the attachment creditors for loss of the pre-judgment security.

We have several observations to make on this point. We shall discuss, first, the potential liability of the Federal Reserve Bank and, second, the potential liability of the United States.

#### 1. Liability of Federal Reserve Bank

As a matter of practice, the Federal Reserve Bank of New York has not resisted the attempts of domestic creditors to attach foreign funds on deposit with that Bank. *See, e.g., National American Corp.* v. *Federal Republic of Nigeria*, 448 F. Supp. 622 (S.D.N.Y. 1978). Whether this practice is necessary, we do not know. It is obviously in harmony with the interests of domestic creditors, including the member banks of the

New York district. As you may know, these banks elect a majority of the directors of the Board of Directors of the Reserve Bank.

Under New York law the garnishee of a valid attachment order is accountable to the attachment creditor for any losses sustained by the creditor as a result of release of the attached property in violation of the order. *See Fitchburg Yarn Co.* v. *Wall & Co.,* 361 N.Y.S.2d 170 (App. Div. 1974). Whether this rule, or an analogous federal rule, will be enforced against the garnishee of a *federal* attachment order issued by a district court in New York under Rule 64 of the Rules of Civil Procedure, we cannot say. We have found no case on point. We can say, however, that if federal law (Rule 64) permits a third party to be subjected to garnishment in the first instance, it is a small thing to conclude that the third party may then be held to account for any violation of his duty as garnishee. The imposition of the duty implies a remedy for its breach. Again, we have not found a case on point; but we know of no reason why, as a general proposition, the garnishee of a federal attachment order issued under Rule 64 of the Rules of Civil Procedure cannot be subjected to civil liability for violation of the order.

What is the rule where the garnishee is a Federal Reserve Bank? Federal Reserve Banks are the tools of the Federal Reserve System, but they are corporate entities, they are owned by their shareholders, and they can "sue and be sued." The relevant statutes and the case law contain no hint that they enjoy general immunity from suit or liability for the wrongs they commit in the conduct of their business. Indeed, the relevant jurisdictional statute assumes that they can and will be subject (in federal court) to "suits of a civil nature at common law or in equity." *See* 12 U.S.C. § 632. This statute grants them a special immunity from prejudgment remedies in cases in which they themselves are parties defendant, but it does not provide them with immunity from execution on final judgment. Moreover, the shareholders of Federal Reserve Banks (the private "member" banks of the Federal Reserve System) are, by statute, responsible "individually" for all the "contracts, *debts* and *engagements*" of the Reserve Banks. *See* 12 U.S.C. § 502 (emphasis added). If a private national bank can be held civilly liable for wrongful release of attached funds, we find no clear indication that a Federal Reserve Bank can or should be accorded a different treatment.

We have expressed the view that a presidential order nullifying these attachments would be lawful. We think the Federal Reserve Bank could not incur liability to any attachment creditor for making a transfer that is authorized by a lawful presidential order. Moreover, there is a serious question whether these attachments are valid in any event.[8] If the attachments are invalid, then as a matter of general law the garnishee can incur no liability to the attachment-creditors for transferring the attached funds. *See, e.g., United Collieries* v. *Martin,* 248 Ky. 808, 60 S.W. 2d 125 (1933); *Smith, Thorndike & Brown Co.* v. *Mutual Fire Ins. Co.,* 110 Wis. 602, 86 N.W. 241 (1901); *Henkel* v. *Bi-Metallic Bank,* 13 Colo. App. 410, 58 P. 336 (1899). Finally, even if the attachments are valid and even if they cannot be revoked under IEEPA, it is clear that the attachment creditors will sustain actual damage from a present transfer of the attached funds only if (1) their underlying claims are good on the merits, (2) their claims are not extinguished by a claims settlement,[9] (3) their claims can be reduced to final judgment, and (4) the relevant law, including FSIA, would permit those judgments to be paid out of the attached funds. With regard to the last point, we note that the present IEEPA regulations prevent any final judgment from being paid out of this property. Our view is that the creditors will be unable to demonstrate that they have been damaged by any transfer of the attached property unless they can show that this prohibition against the payment of final judgments could not lawfully be sustained in the future to bar the perfection (through execution on final judgment) of the mere provisional interests now being asserted in this property through attachment.

In all, there are so many contingencies standing in the way of garnishee liability in this case that it is difficult to make a realistic assessment of the actual risk. At the same time, given the amount of money in question, it is obvious that *any* risk of liability militates strongly in favor of a conservative approach to the transfer question, all other things being equal. This brings us to our final point.

Congress knew that any significant presidential action under IEEPA would upset existing legal relations, and give rise to claims and counterclaims among persons subject to the presidential order. Recognizing that these persons might be reluctant to rely on the order for fear of liability, Congress took care to preserve in IEEPA the exculpatory provision that had long been present in the Trading with the Enemy Act. We have referred to that provision above.

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[8] Invoking a creative legal theory in his interpretation of FSIA, Judge Duffy has recently held that these attachments are not barred by FSIA and are otherwise valid. We disagree with the holding. FSIA provides that the assets of a foreign government are immune from prejudgment attachment unless the foreign government *explicitly* waives its immunity. 28 U.S.C. § 1610(d). This statutory immunity is subject to existing international agreements. 28 U.S.C. § 1609. One district court has held that while there has been no explicit waiver of immunity by Iran, the Treaty of Amity between Iran and the United States, which pre-dated FSIA, waived immunity from attachment with respect to military property. *Behring International, Inc.* v. *Imperial Iranian Air Force,* 475 F. Supp. 383 (D.N.J. 1979). FSIA provides that the assets of a foreign central bank are immune from attachment and execution unless the bank or its parent foreign government explicitly waives immunity. 28 U.S.C. § 1611(b)(1). As yet, there are no published opinions addressing the immunity of foreign central banks from attachment under FSIA. Two district courts have held, however, that FSIA renders the assets of the government of Iran immune from attachment because Iran has not waived immunity from attachment. *See Reading & Bates Corp.* v. *National Iranian Oil,* 478 F. Supp. 724 (S.D.N.Y. 1979) and *E–Systems, Inc.* v. *Islamic Republic of Iran,* 491 F. Supp. 1294, (N.D. Tex. 1980).

[9] We do not think that the acquisition of a provisional interest in foreign property through attachment immunizes the underlying claim from the government's power to settle that claim as part of an overall claims settlement. The provisional interest is only as good as the underlying claim. It dies if the claim dies. The power of the government to extinguish claims through settlement is clear. *See* Memorandum for the Attorney General dated September 16, 1980, "Presidential Authority to Settle the Iranian Crisis" [p. 248, *supra*].

We know of no reason why this provision cannot be read for what it says. In our opinion, it would exculpate a garnishee (a mere stakeholder) who has relied in good faith upon a lawful presidential order authorizing release of attached funds under IEEPA. Would the exculpation be effective if the presidential action were ultimately held to be unlawful? The whole purpose of this provision is to resolve legal doubts and to encourage persons to rely upon emergency presidential action under IEEPA wherever they can do so in good faith. That purpose would be wholly frustrated if the provision were read to expose compliant individuals to liability for presidential mistakes. If individual liability were to depend in the end on the legality of what the President has done, no one with significant exposure would comply willingly with any presidential order until all the legal questions presented by the action had been definitively resolved. In our opinion, Congress has undertaken to prevent that impasse. Congress has immunized good faith compliance with emergency orders under IEEPA whether the orders are mistaken or not. We have found one district court opinion, *Garvan* v. *Marconi Wireless Tele. Co.*, 275 F. 486 (D.N.J. 1921), that supports this conclusion.

### 2. Liability of the United States

Either IEEPA authorizes nullification of these attachments, or it does not. If it authorizes nullification, there is a possibility that the United States may incur a constitutional liability as a result of nullification, *i.e.*, a liability imposed by the Fifth Amendment, which requires the United States to pay compensation when it "takes" private property for public use. That liability would provide a basis for an action by the creditors against the United States in the Court of Claims. We have expressed the view, however, that nullification of these attachments under IEEPA will not constitute a taking of private property in the Fifth Amendment sense.

Paradoxically, if IEEPA does not authorize nullification, the risk of constitutional liability is even smaller. As a general proposition, unauthorized executive action that destroys or harms private interests in property does not subject the United States to liability for a taking under the Fifth Amendment. *See, e.g., Hooe* v. *United States*, 218 U.S. 322 (1910); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952); 42 Op. Att'y Gen. 441, 445–46. To be sure, unauthorized action may be tortious, and it may subject the executive officer himself to individual liability;[10] but it generally does not give rise to a constitutional claim against the government itself.

Is there any other basis for liability? The Federal Tort Claims Act is a possibility. It makes the United States liable for "tort claims" arising from the wrongful acts or omissions of officers and employees of the United States in certain circumstances. *See* 28 U.S.C. § 2674. But Congress has expressly excepted from the provisions of that Act "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance of the failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). In our opinion, this express exception to the Tort Claims Act would be fully applicable in the case presented here, whether or not the President's action is ultimately approved by the courts.[11]

Aside from the question of tort claims, we think it very doubtful that any other statute—IEEPA itself, Rule 64, the organic legislation establishing the Federal Reserve Bank, etc.—can be construed to grant a right of action against the United States in these circumstances. Such a grant must be made with specificity. *See United States* v. *Testan,* 424 U.S. 392, 400 (1976). Absent a contract or a claim for the return of money paid by the claimant to the government, there can be no private right to money damages in a suit against the United States unless a federal statute "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Id.* at 400, *citing Eastport S.S. Corp.* v. *United States,* 372 F.2d 1002–09 (Ct. Cl. 1967). We know of no federal statute that specifically grants a right of action against the United States for wrongful release of attached funds by a Federal Reserve Bank or "mandates" compensation by the United States for the damages sustained by the attachment creditors.

Finally, there is at least a theoretical possibility of liability based on contract. It is clear, of course, that the United States can be held to account in a Court of Claims for damages resulting from a breach of an express contract and a contract implied in fact. Over the years, creative lawyers have been able to exploit this potential liability by arguing where all else fails that their claims rest upon implied "promises" of one kind or another. We do not know what express or implied representations the Federal Reserve Bank or the organs of the government may have made to the creditors in the present case, or what consideration the creditors may have advanced in return; but we do know that the government has formally and expressly represented from the very start, in the blocking regulations themselves, that the authorization for these attachments may be withdrawn, and the government has expressly declined to provide assurance that the attached funds will ever be available to satisfy any final judgments. It seems to us that these formal representations leave relatively little room for a successful claim that the government has somehow promised to keep these funds secure for the creditors' benefit. We do not know all the facts, but we see little risk of a successful contract claim against the government itself.

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[10] We believe that in this case, however, the executive officer would be relieved of liability by the exculpatory provision in IEEPA.

[11] The Federal Tort Claims Act has always contained a separate, express exception for claims arising out of the administration of the Trading with the Enemy Act. *See* 28 U.S.C. § 2680(e). When Congress created IEEPA, lifting it from the Trading with the Enemy Act, it neglected to amend this provision to include IEEPA within the terms of the traditional exception. We think this was an innocent oversight. We find nothing in the relevant legislative history that suggests that Congress intended to subject the United States to liability for the mistakes made by officers and agencies of the United States in the administration of IEEPA while preserving sovereign immunity with respect to mistakes made under the identical provisions of the Trading with the Enemy Act. In any case, the general exception contained in 28 U.S.C. § 2680(a) applies to action under IEEPA, in our view.

JOHN M. HARMON
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## Presidential Authority to Settle Claims of the Hostages and Their Families

**The President may agree to a settlement with Iran whereby any tort claims of the hostages and their families against Iran would be extinguished, without working a taking for a public purpose within the Just Compensation Clause of the Fifth Amendment. This conclusion is reinforced by the difficulty of identifying loss to the hostages and their families as a result of a claims settlement effected to secure their release, and the unlikelihood of their being able to recover in tort against Iran in any event in light of the noncommercial tort provision in the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(5).**

October 14, 1980

### MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This responds to your request for our views on the authority of the President, pursuant to a general settlement of the present controversy with Iran that effects the release of the hostages, to extinguish tort claims the hostages and their families may wish to assert against the government of Iran. Our memorandum to you of September 16, 1980, regarding presidential authority to settle the Iranian crisis explores the President's claims settlement authority in detail. [*See* p. 248 *supra.*] Rather than repeat that discussion here, we will advert to its conclusions insofar as they affect the present discussion. We conclude here that the President has authority to extinguish the claims of the hostages and their families.

The President's authority over claims of our nationals against foreign governments is well summarized in Restatement (Second) of Foreign Relations Law of the United States § 213 (1965):

> The President may waive or settle a claim against a foreign state based on the responsibility of the foreign state for an injury to a United States national, without the consent of such national.

Presidents have often exercised this power to espouse and settle the claims of our citizens; these claims have often included tort claims for personal injury or death. *See id.,* Reporter's note to § 212.

Our earlier memorandum concluded that an exercise of this presidential authority to settle a claim for less than face value would not constitute a taking of private property within the meaning of the Just Compensation Clause of the Fifth Amendment to the Constitution.

Nevertheless, we noted the existence of dicta to the contrary in two Court of Claims decisions, principally *Gray* v. *United States*, 21 Ct. Cl. 340 (1886). Those dicta suggested that if the President settles a claim for less than "value" for unrelated foreign policy purposes, a taking of property for public use occurs. Whatever the current vitality of the *Gray* dicta, the question at hand is distinguishable, because these claims are held by persons whose benefit is a prime purpose of the Administration's negotiations to settle the crisis—the hostages themselves and their families. When a settlement is reached, no court will be in a position to determine whether release could have been secured without settlement or extinction of the tort claims in return.

The foregoing conclusion regarding the difficulty of identifying loss to the hostages and their families as a result of a claims settlement is reinforced by analysis of their prospects for tort recovery absent an agreement. For several reasons, it seems unlikely that they could recover damages against the government of Iran in court. First, the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(5), only allows the courts to award tort damages "against a foreign state for personal injury or death, . . . occurring in the United States." Torts to the hostages have not occurred in the United States. Regarding claims by their families for such torts as intentional infliction of emotional distress, it could be argued that the statute is ambiguous regarding whether it is enough for the injury to occur here even if the wrong does not. The Act's legislative history, however, emphasizes that the immunity of foreign states for their "public" acts as opposed to "commercial or private" acts is to be maintained, and that the exception for torts in the United States "is directed primarily at the problem of traffic accidents," suggesting that actionable wrongs must occur here. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7, 20 (1976). Thus it seems unlikely that the hostage families could recover against Iran in American courts. Morever, tort claimants cannot reach any Iranian assets in the United States without a license from the government because of the blocking order, and our earlier memorandum makes it clear that access to blocked assets cannot be a matter of legal right. Finally, if the hostages and their families were to resort to a foreign forum in which Iranian assets might be found, they would discover that doctrines of sovereign immunity of a foreign state are general in international law.

We also note that Congress is currently considering a bill (H.R. 7085) that would provide hostages and their families a variety of benefits in compensation for their travail.* If these benefits may fairly be viewed as compensation for the loss of their tort claims, it would be even more difficult to conclude that any constitutional taking has occurred.

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*Note: The bill cited was eventually enacted as Pub. L. No. 96-449, 94 Stat. 1967 (1980). Ed.

**Recognition of the prospect of a claims settlement in the legislative history would be helpful in this regard.**

**JOHN M. HARMON**
***Assistant Attorney General***
***Office of Legal Counsel***

# Congressional Authority to Modify an Executive Agreement Settling Claims Against Iran

**Congress has plenary authority to modify or abrogate preexisting executive agreements or treaties for domestic law purposes, and could thus pass legislation reviving tort claims of American hostages and their families against Iran that might be extinguished by an executive agreement with Iran.**

**November 13, 1980**

## MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This responds to your request for our opinion whether, if the President enters an executive agreement with Iran settling or extinguishing the claims of American citizens against Iran, Congress could constitutionally override the agreement with a statute reviving such claims. We conclude that Congress has the power to do so.

In our memoranda to you of September 16, 1980, and October 14, 1980, we concluded that the President has the power to enter an executive agreement with Iran that would settle or extinguish the claims of American citizens against Iran. It is settled, however, that Congress may enact legislation modifying or abrogating executive agreements or treaties. *See, e.g., La Abra Silver Mining Co.* v. *United States,* 175 U.S. 423, 460 (1899):

> It has been adjudged that Congress by legislation, and so far as the people and authorities of the United States are concerned, could abrogate a treaty made between this country and another country which had been negotiated by the President and approved by the Senate. *Head Money Cases,* 112 U.S. 580, 599; *Whitney* v. *Robertson,* 124 U.S. 190, 194; *Chinese Exclusion Case,* 130 U.S. 581, 600; *Fong Yue Ting* v. *United States,* 149 U.S. 698, 721.

*See also Reid* v. *Covert,* 354 U.S. 1, 18 (1957); Restatement (Second) of Foreign Relations Law of the United States § 145 (1965) (legislation supersedes executive agreement as domestic law of the United States, but does not affect international obligations). The authorities treat the power of Congress to enact statutes that supersede executive agreements and treaties for purposes of domestic law as a plenary one, not subject to exceptions based on the President's broad powers concerning foreign affairs.

In the present context, the prospect is that despite the existence of an executive agreement settling all claims, Congress might amend the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 *et seq.*, to abrogate the immunity of the government of Iran for tort claims brought by the hostages or their families. At present, the FSIA codifies generally accepted international law doctrine that accords a foreign state immunity for its governmental acts, but not its commercial ones. *See generally* H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976). In particular, 28 U.S.C. § 1605(a)(2) preserves immunity for tort claims against foreign states, except for those based on torts occurring in the United States and not involving a discretionary function. Therefore, to abrogate a claims settlement, Congress would also except from immunity claims based on injuries suffered in consequence of the seizure of the American embassy in Iran in November, 1979, and subsequent detention of persons found there.

Such an amendment, we believe, would be constitutional, despite its apparent retroactivity. It appears to be well within Congress' general authority to modify or abrogate preexisting executive agreements for domestic law purposes.[1] Also, the government of Iran would have no grounds for objecting to it in the courts of the United States. As we concluded in our memorandum to you of September 16, 1980, entitled "Congressional Power To Provide for the Vesting of Iranian Deposits in Foreign Branches of United States Banks" [p. 265 *supra*], foreign states do not enjoy the protection of the Due Process Clause. Finally, there would appear to be no other pertinent limit on the power of the federal courts to entertain these claims. Sovereign immunity is an affirmative defense that does not vitiate a claim but only prevents recovery. *See* Restatement, *supra*, §§ 71–72. Accordingly, it appears that neither an executive agreement removing the remedy nor a statute restoring it should affect the validity of the underlying claims. *See* Lillich, *The Gravel Amendment to the Trade Reform Act of 1974: Congress Checkmates a Presidential Lump Sum Agreement*, 69 Am. J. Int. L. 837 (1975).

Thus, we conclude that there is no legal impediment to an amendment to the FSIA that would abrogate Iran's sovereign immunity for these claims, if Congress decides to carve an exception to a policy of recognizing immunity for governmental acts that the United States has followed consistently since at least 1952. *See* House Report, *supra*, at 7–8. In doing so, Congress could establish a federal cause of action, in order to avoid the vagaries of state tort law.

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[1] The Restatement, *supra*, indicates that although domestic law would change, international obligations would not, and would remain enforceable by the usual means, such as suspension of reciprocal obligations and resort to an international forum.

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*Office of Legal Counsel*

# Effect Within the United States of Iranian Decrees Confiscating the Shah's Assets

**Courts of the United States may give effect to Iranian decrees confiscating the property of the late Shah and his family, and will do so if the Executive stipulates, as an integral part of an international agreement with Iran, that such decrees will be given extraterritorial effect within the United States.**

November 17, 1980

## MEMORANDUM OPINION FOR THE LEGAL ADVISER, DEPARTMENT OF STATE

We have explored the question whether the United States can give effect within the United States to Iranian decrees confiscating the property of the late Shah and his close relatives. This issue arises from the demand of the Iranian government that we recognize the nationalization as a condition to resuming normal relations and securing return of the hostages. Our general conclusion is that the Executive can, as an integral part of an agreement with Iran, stipulate that the decrees will have extraterritorial effect and that the courts will recognize such an agreement. On the other hand, if the government simply announces that the decrees should be given effect here or makes such a representation in court, the courts would not treat the position as conclusive.

Generally, under the act of state doctrine, the courts of one nation will not sit in judgment on the act of another nation within the latter's territory. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 416 (1964). However, the validity of an act of a foreign state with respect to matters *outside* its territory may be examined by our courts under applicable laws and will only be given effect if in accord with our public policy. Restatement (Second) of Foreign Relations Law of the United States § 43 (1965). Thus, it is not unusual to find American court decisions not giving extraterritorial effect to foreign confiscation decrees. In a situation similar to the case at hand, the Second Circuit refused to give effect to a decree by which Iraq purported to confiscate the estate of King Faisal II, who was killed in a revolution in 1958. *Republic of Iraq* v. *First National City Bank*, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966). Iraq sued to recover the King's estate in the United States. The court said that confiscation of the assets of an individual is contrary to our public policy and sense of justice, citing the Due Process Clause and the prohibition against bills of attainder. *Id.* at 51–52.

The question arises as to whether the Executive can do anything to alter such a determination. (In the *Iraq* case the Executive made no attempt to indicate a federal policy on recognition of the decrees and left the policy determination to the courts.) Although application of the act of state doctrine "must be treated exclusively as an aspect of federal law," *Sabbatino,* 376 U.S. at 423–27, nevertheless, the Supreme Court has concluded that the courts are not bound to follow the Executive in cases where it makes suggestions as to whether the doctrine should apply. *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759 (1972). The filing of a suggestion of interest would not therefore assure that the Executive's views would be followed.

The Iranians have also demanded that the United States issue a proclamation dealing with the Shah's property. In view of *First National City Bank,* it is not clear that the courts would consider such a proclamation conclusive. Thus, it would probably be treated like a formalized suggestion of interest.[1]

An executive agreement would, however, stand on a different footing. The principle has been established that federal policy must be recognized as binding when the Executive enters an international agreement which recognizes the validity of foreign expropriation decrees. The Soviet government took power in 1918 and nationalized the assets of many enterprises wherever situated. When the United States recognized the Soviet government in 1933, it settled claims with the Soviet Union by taking an assignment of Soviet assets in the United States. The assignment included the nationalized property. The United States government sued in local courts for possession of the assigned assets. The New York courts ruled that recognition of the expropriations was contrary to the controlling public policy, and that the United States could take by assignment no more than the Soviet government had. The Supreme Court reversed, holding that the assignment was a valid exercise of the President's foreign relations power and that the international agreement (giving extraterritorial effect to the confiscations) was binding on the courts. *United States* v. *Pink,* 315 U.S. 203 (1942); *United States* v. *Belmont,* 301 U.S. 324 (1937). In the present case the United States would presumably not be taking an assignment of the Shah's assets,[2] but if the recognition of the expropriation were an integral part of a claims agreement, we believe the holdings of *Pink* and *Belmont* would apply.

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[1] The language of the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1702 (Supp. I 1977), states that the President may "prevent . . . any . . . withholding of . . . any property in which any foreign country . . . has any interest." This raises the possibility that IEEPA may be used to bolster the legal position of the Iranian authorities vis-a-vis the Shah's family. We know of no precedent, however, for the use of either IEEPA or its predecessor, the Trading with the Enemy Act, for such a purpose and express no opinion on the question at this time. Care should be taken to make clear that the United States is not by its own action nationalizing the Shah's assests but merely recognizing Iran's actions. The treatment a foreign government gives its own nationals does not in itself raise Fifth Amendment questions. *United States* v. *Belmont,* 301 U.S. 324, 332 (1937).

We also believe that *Pink* and *Belmont* are still controlling law. Although these cases have been distinguished by courts refusing to give extraterritorial effect to confiscations, in the absence of an international agreement, they have not been questioned on their own facts. The *Iraq* case, 353 F.2d at 52, affirmed that policy could be set by international agreement:

> Such action of the Chief Executive, taken under his power to conduct the foreign relations of the United States, was considered to make the Soviet confiscation decrees consistent with the law and policy of the United States from that time forward, and, as we now know from *Sabbatino,* federal law controls.

*Sabbatino* itself did not deal with the extraterritorial issue, but the holding of the case recognized, 376 U.S., at 428, that a treaty or "other unambiguous agreement" could establish controlling legal principles in an act of state case.[3] Although a majority of the court in *First National City Bank, supra,* stressed the fact that the Executive's representations to the courts were not to be conclusive, a fair reading of the case does not suggest that the Court intended to limit the President's power to conclude international agreements or to change their effect.

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[2] Conceivably this might be done as a set-off for certain claims although we do not know of its having been proposed. It should be noted that in *Belmont* and *Pink* the net effect of recognizing the confiscations was to make additional assets available to U.S. claimants, some of whom had suffered from other Soviet expropriations. Even if the United States does not take an assignment of these assets, it might be argued that any potential claims pool with Iran has been increased by our crediting the Iranian decree in the context of a total settlement.

[3] *See also* White, J., dissenting: "No one seriously argued that the act of state doctrine precludes reliance on a binational compact dealing with the effect to be afforded or denied a foreign act of state." *Id.* at 444 n. 2.

# Diverting Oil Imports to United States Allies

The International Emergency Economic Powers Act would authorize the President, in order to deal with an Iranian cutoff of oil to United States allies, to require American oil companies and foreign entities they control to ship oil they acquire abroad to certain specified nations and in certain specified quantities. While there must be a "foreign interest" in the oil for the President to invoke IEEPA's powers, foreign interest unassociated with the nation that is creating the emergency would be sufficient.

Section 232(b) of the Trade Expansion Act would allow the President to impose a quota on oil imports for national security reasons, including reasons relating to foreign policy considerations; however, it would not give him power to direct the diversion of oil imports to other countries.

January 12, 1981

## MEMORANDUM OPINION FOR THE ASSOCIATE ATTORNEY GENERAL

Iran may end or reduce exports of its oil to some of our allies who are heavily dependent on Iranian oil. You have asked us whether the President has authority to divert to those allies shipments of foreign oil that would otherwise be imported into the United States. We believe the President has this authority over at least some such shipments. There are several possible sources of authority; the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701–1706 (Supp. I 1977), seems the clearest and most appropriate.

### I. The International Emergency Economic Powers Act

We believe that the IEEPA empowers the President, in dealing with a declared national emergency, to require American oil companies and entities they control to sell any oil they acquire or can acquire abroad—except perhaps oil the company itself already owns, free of all foreign rights—and to sell it only to nations specified by the President and in quantities the President specifies. If the President enters such an order to deal with the Iranian hostage crisis, or the emergency declared in connection with the Soviet invasion of Afghanistan, he need not declare another national emergency. If the need to divert oil shipments arises from a separate emergency, that emergency should be declared. [1]

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[1] We would alert you to Congress' injunction that "emergencies are by their nature rare and brief, and are not to be equated with normal, ongoing problems. A national emergency should be declared

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Section 203(a)(1)(B) of the IEEPA, 50 U.S.C. § 1702(a)(1)(B), authorizes the President, in dealing with a national emergency, to:

> investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest;

by any person, or with respect to any property, subject to the jurisdiction of the United States.

On its face this provision appears to give the President power to require American companies, and foreign entities they control,[2] to ship oil they acquire abroad to certain other nations and in certain quantities.

The principal difficulty with the President's using this power is that it is unclear whether all oil acquired abroad by American companies is "property in which [a] foreign country or a national thereof has any interest." Some oil is owned by a foreign nation or foreign national but can be acquired by an American company; this is plainly property in which there is a foreign interest, at least until after the time it is acquired. Since "any" interest will suffice, we believe that oil in which a foreign nation or national has a contract right—for example, a right to refuse to allow the oil to be shipped unless a certain royalty is paid—is also subject to the President's power.

Because the United States is not now importing oil from Iran, the foreign interest will not be that of Iran, and will probably not be that of an Iranian national; it may be argued that § 203(a)(1)(B) does not reach property in which the only foreign interest is unassociated with the nation that is the cause of the emergency. We do not believe this argument is correct, however. Section 203(a)(1)(B) refers to "*any* foreign country or a national thereof" (emphasis added), and the legislative history of the IEEPA suggests that the principal reason for the foreign interest limitation was to prevent the President from regulating "domestic" transactions, *see, e.g.*, H.R. Rep. No. 459, 95th Cong., 1st

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and emergency authorities employed only with respect to a specific set of circumstances which constitute a real emergency, and for no other purpose. The emergency should be terminated in a timely manner when the factual state of emergency is over and not continued in effect for use in other circumstances. A state of national emergency should not be a normal state of affairs." H.R. Rep. No. 459, 95th Cong., 1st Sess. 10 (1977).

[2] American corporations are clearly subject to the jurisdiction of the United States. *See* Restatement (Second) of Foreign Relations Law of the United States, §§ 27, 30 (1965). Foreign entities they control may also be, although they may be subject to the competing jurisdiction of the foreign country. In addition, § 203(a)(1)(B) permits the President to "regulate, [or] direct and compel, . . . [the] exercising [of] any right, power, or privilege with respect to . . . any [foreign] property." We believe this authorizes the President to require an American company to exercise its control over foreign entities in the way the President directs, at least when the direction furthers the purposes of other regulations imposed under the IEEPA.

Sess. 11 (1977), not to limit the foreign nations whose interests might be affected. Moreover, Congress probably expected the IEEPA to be used for emergencies—international monetary disorders, for example—that do not originate in any single country. Similarly, a diversion of oil imports might be an effort to coordinate our international trade in a way that serves the economic and political objectives the President is pursuing in dealing with a declared emergency. If it were, we believe that it would be the sort of action Congress expected the President to take under the IEEPA.

Some oil located abroad may be entirely owned by an American corporation and not subject to any foreign nation's or national's property or contract rights.[3] It is much more difficult to conclude that there is a foreign interest in this oil. It seems unlikely, although perhaps arguable, that a nation's ability to tax a quantity of oil, seize it or prevent its shipment by asserting eminent domain, and otherwise exert jurisdiction over it, constitute an "interest" in the oil. Some courts have suggested that a foreign nation has an "interest"—within the meaning of § 5(b) of the Trading with the Enemy Act, the predecessor of the IEEPA—in any item it exports. Those courts reasoned that by selling its products abroad a nation helps "to sustain its internal economy and provide it with foreign exchange." *See United States* v. *Broverman,* 180 F. Supp. 631, 636 (S.D.N.Y. 1959); *Heaton* v. *United States,* 353 F.2d 288, 291–92 (9th Cir. 1965). But we have substantial doubt that this is a sufficiently direct interest to permit regulation under § 203(a)(1)(B) of the IEEPA, at least if the object of the regulation is not to disrupt a nation's internal economy or deprive it of foreign exchange.[4]

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[3] We express no opinion on the extent to which American corporations' acquisitions of oil from foreign nations may be regulated retroactively under the IEEPA.

[4] We have these doubts for several reasons. First, the language of § 203(a)(1)(B) suggests that the term "interest" should not be interpreted in a way that has no connection to its usual legal meaning. Section 203(a)(1)(B) refers to property in which a "foreign country *or a national thereof* has any interest" (emphasis added); this may suggest that the drafters intended to reach only those kinds of interests of foreign nations which could also be held by individuals. Moreover, in describing the President's powers, § 203(a)(1)(B) uses highly inclusive language—"investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer [etc.]"—that was evidently intended to cover a wide variety of possible actions. Section 203(a)(1)(B) does not use comparably inclusive language in describing the range of foreign interests covered. This may suggest that the drafters of the IEEPA did not intend the term "interest" to be extraordinarily inclusive. In ordinary legal usage, a nation would not have an "interest" in a piece of property unless it owned it or had an indirect, partial, contingent, or future interest in it, or a contract right to it; one would not ordinarily say that a nation had an "interest" in all the property located within its borders.

Second, Congress clearly intended that the President not use the IEEPA to regulate "wholly domestic" transactions. *See, e.g.,* H.R. Rep. No. 459, 95th Cong., 1st Sess. 11 (1977). We recognize that § 203(a)(1)(B), enacted as part of the IEEPA in 1977, contains the same language as § 5(b) of the Trading with the Enemy Act, the cases cited in the text interpreted this language. Congress presumably knew of these cases when it enacted § 203(a)(1)(B) in this form. But if we were to adopt the broadest possible interpretation of these cases—that a nation has an "interest" in property, within the meaning of § 203(a)(1)(B), whenever transactions in that property can have an important effect on its economy—we would allow the President to regulate wholly domestic transactions, in violation of Congress' clear intentions; foreign countries' economies may be substantially affected by wholly domestic American transactions. We see no other principled interpretation of the term "foreign . . . interest" in § 203(a)(1)(B) that would allow the President to regulate transactions in oil that is located

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The President may be able to reach transactions in American-owned oil located abroad under a different provision of the IEEPA, § 203(a)(1)(A)(i), 50 U.S.C. § 1702(a)(1)(A)(i). That provision authorizes the President, in dealing with a national emergency, to "investigate, regulate, or prohibit . . . any transactions in foreign exchange . . . by any person, or with respect to any property, subject to the jurisdiction of the United States." An American company which owned oil located abroad would presumably have to deal in foreign exchange in order to sell the oil; the foreign exchange transactions associated with such sales might be regulated in a way that compelled the company to comply with the President's directions. While this provision of the IEEPA on its face seems to permit such regulation, some substantial objections can be raised. Arguably, Congress envisioned that the § 203(a)(1)(A)(i) authority to regulate transactions in foreign exchange would be invoked only where the President's concern was with the use of foreign exchange in the transaction. Congress probably did not intend the President to take advantage of the fact that foreign exchange was involved solely as a means of reaching transactions that he otherwise could not regulate. In other words, in enacting § 203(a)(1)(B) Congress may have intended to limit the President's power over transactions in property to property in which there was a foreign interest; if so, Congress would not have intended the President to use his authority over transactions in foreign exchange to circumvent that limitation. For these reasons, we have substantial doubt about the President's authority under the IEEPA to regulate transactions in oil that is located abroad but entirely owned by American companies. To the extent that the reasons for regulating such transactions are related to the fact that the transactions involve foreign exchange, the argument that § 203(a)(1)(A)(i) grants the President authority to regulate them is enhanced. On the facts as known to us, however, it is difficult to discern such a relationship.

Finally, it can be argued that while § 203(a)(1)(B) authorizes the President to "direct and compel . . . [the] acquisition" of oil in which there is a foreign interest, the foreign interest disappears as soon as an American company acquires the oil, and the President loses his power to direct the oil to a destination or otherwise to control its sale. For several reasons, we believe this argument is incorrect. As far as the text of the Act is concerned, the President has the power to "regulate" the acquisition of the oil; this suggests that he may order that it not be acquired unless it will be shipped to the destination he has designated. In addition, the President may "regulate [or] direct and compel . . . any . . . use, transfer, . . . transportation . . . dealing in . . . or transactions involving" property in which there is a foreign interest. By

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within a foreign nation but wholly owned by an American corporation, at least when the purpose of the regulation is not to disrupt the foreign nation's economy. *See also Permian Basin Area Rate Cases*, 390 U.S. 747, 777, 780 (1968).

requiring oil to be shipped from one foreign country to another, the President appears to be simply regulating or directing a transfer, transportation, or dealing in the oil. Moreover, the President may "regulate, direct and compel, nullify, void, prevent or prohibit, any . . . dealing in, or exercising any right, power, or privilege with respect to" oil in which there is a foreign interest. We believe the President may, under this authority, order American companies to obligate any oil they can obtain from a foreign nation or national to other countries. These are not merely strained textual arguments designed to give the President control over essentially domestic transactions. The fact that the oil involved has a foreign origin may be significant, not adventitious. For example, the President may determine that precisely because the United States is a leading consumer of oil from other nations, it must make a special effort to aid its allies.

## II. Section 232(b) of the Trade Expansion Act

Section 232(b) of the Trade Expansion Act, 19 U.S.C. § 1862(b), appears to permit the President to respond to an Iranian oil cutoff by imposing a quota on oil imports into the United States. The effect of such a quota would depend on market conditions, but it would probably free additional supplies for our allies to purchase. The legal objections to this approach can be answered; the practical problems may be more serious.

Section 232(b) authorizes the President to "take such action, and for such time, as he deems necessary to adjust the imports of [an] article and its derivatives so that such imports will not threaten to impair the national security." The President can make such an adjustment if the Secretary of Commerce—formerly the Secretary of the Treasury, *see* Reorganization Plan No. 3 of 1979, § 5(a)(1)(B), 93 Stat. 1381—conducts an investigation and finds that an article "is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security." In March 1979, the Secretary of the Treasury completed such an investigation and concluded that imports of crude oil and oil products into the United States threatened to impair the national security.[5] *See* 44 Fed. Reg. 18,818 (1979). It is

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[5] While this finding did not, of course, anticipate the Iranian oil cutoff with which we are now concerned, it did emphasize the risks of depending on oil from countries with which the United States might have "political disagreement[s]" and the unreliability of oil supplies from those nations. It even mentioned the Iranian revolutionary regime's reductions in oil shipments as an example. *See* 44 Fed. Reg. 18,818, 18,820 (1979). Moreover, in 1975 the Attorney General issued an opinion that a finding made in 1959 continued to authorize import adjustments by the President. He said that no new finding was necessary in 1975, even though there had been a "drastic change from the factual situation which provided the basis of the 1959 finding," and even though, shortly before he issued his opinion, the authority to make such a finding had been transferred from the Director of the Office of Emergency Planning to the Secretary of the Treasury, *see* Pub. L. No. 93-618, § 127(d), 88 Stat. 1993 (1975). 43 Op. Att'y Gen. No. 3 at p. 2 (1975). The Attorney General reasoned that the President's § 232(b) power to take "such action . . . as he deems necessary" to adjust imports is authority to take not just

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clear that the President's power to "adjust" imports includes the power to impose an import quota. *See Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 561, 571 (1975).

We understand, however, that the President wishes to divert oil primarily to deal with the foreign policy consequences of an Iranian cutoff. It might be argued that it is inconsistent with Congress' intentions to use § 232(b) to deal with the foreign policy implications of imports. The language of the statute and its legislative history suggest that Congress expected § 232(b) to be used primarily to protect domestic industries or, more generally, to deal with the domestic consequences of imports. *See, e.g.*, § 232(c), 19 U.S.C. § 1862(c). It may be, however, that an Iranian oil cutoff would threaten instability in American domestic markets as well as in world markets, and that a reasonable method of preventing this instability would be to limit imports; in this way the cutoff might be justified as a measure to aid the domestic economy. We do not know whether the facts support this view. More fundamentally, however, while Congress clearly focused on the domestic effects of imports, it did not explicitly limit the President to considering only domestic effects. Instead, it used the term "national security," which ordinarily comprises matters of foreign policy. Congress did not attempt affirmatively to exclude this aspect of the normal meaning of "national security." Since Congress used the term "national security," we believe that the President has the authority to consider all the aspects of national security—including foreign policy—when he adjusts imports under § 232(b).

The practical problems may be more difficult to solve. Section 232(b) allows the President to "adjust . . . imports." It is difficult to construe this as authority to order the holders of oil to do a particular thing with the oil they cannot import. Consequently, § 232(b) does not give the President direct control over the oil diverted from the United States; it is subject to the vagaries of the market. This may be an inefficient, or even ineffective, way of supplying the needs of our allies.

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a single measure but continuing course of action, "a continuing process of monitoring and modifying the import restrictions, as their limitations become apparent and their effects changed." *Id.* Courts enforced restrictions which the President imposed as late as 1968, even though the restrictions were based on the 1959 findings; the courts did not seem to doubt that those findings adequately supported the President's action. *See, e.g., Gulf Oil Corp.* v. *Hickel*, 435 F.2d 440 (D.C. Cir. 1970).

The Attorney General's opinion did not comment on the transfer of the function. It seems reasonable to conclude, however, that if the findings can survive the passage of 16 years and a "drastic change" in circumstances, they can also survive a transfer of functions within an administration. Indeed, earlier this year the President imposed a Gasoline Conservation Fee, *see* Pres. Proc. No. 4744, 45 Fed. Reg. 22,864 (1980), rescinded by Pres. Proc. No. 4766, 45 Fed. Reg. 41,899 (1980), partly on the authority of § 232(b) and the March, 1979, findings of the Secretary of the Treasury. For these reasons, we believe that the March, 1979, findings will support an import quota imposed by the President to deal with an Iranian oil cutoff. Of course, if circumstances and the applicable regulations, *see* § 232(d), 19 U.S.C. § 1862(d), permit, it may be more prudent to have the Secretary of Commerce make a new investigation and enter the finding appropriate to an import quota designed to respond to an Iranian oil cutoff.

### III. The International Energy Program

The Agreement on an International Energy Program, 27 U.S.T. 1685, Nov. 18, 1974, T.I.A.S. No. 8278, is designed to share the effects of oil shortages among the nations participating in the agreement. The United States and the allies who would be most affected by an Iranian oil cutoff are participants. Certain of the participants' obligations take effect if the total imports of all the participating nations fall more than 7 percent from the previous year, or if any one nation's available oil supplies fall more than 7 percent. Specifically, each participant is then obligated to reduce its demand for oil by 7 percent from the previous year and share its savings among the other participants. Under § 251(a) of the Energy Policy and Conservation Act, the President has the power to issue regulations "requir[ing] that persons engaged in producing, transporting, refining, distributing, or storing petroleum products, take such action as he determines to be necessary for implementation of the obligations of the United States under . . . the international energy program insofar as such obligations relate to the international allocation of petroleum products." 42 U.S.C. § 6271(a). We are advised that such regulations already exist. *See* 10 C.F.R. § 218.1–218.43.

We understand, however, that the United States has already reduced its consumption of oil by more than 7 percent from last year. If this is true, then even if other nations' oil supplies fell sharply, the United States would apparently have no further obligations under the Program, and § 251(a) would not grant the President authority to order redistributions of oil.[6] For this reason, the International Energy Program seems an unlikely source of authority for dealing with an Iranian oil cutoff.

John M. Harmon
*Assistant Attorney General*
*Office of Legal Counsel*

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[6] Article 22 of the Agreement provides that:

> The Governing Board may at any time decide by unanimity to activate any appropriate emergency measures not provided for in this Agreement, if the situation so requires.

The Governing Board is composed of members from each participating country. Article 50, § 1. Measures adopted by the Board in this way may impose on the United States additional "obligations" within the meaning of § 251(a) of the Energy Policy and Conservation Act, although it might be argued that since the United States can veto such a measure, it cannot be said to impose an obligation.

# Legality of the International Agreement with Iran and Its Implementing Executive Orders

Executive orders providing for the establishment of escrow accounts with the Bank of England and the Central Bank of Algeria, directing the transfer of previously blocked Iranian government assets to those accounts, and nullifying all interests in the assets other than the interests of Iran and its agents, are within the President's authority under the International Emergency Economic Powers Act (IEEPA). Banks and other holders of Iranian assets need not await formal vacation of court-ordered attachments before complying with transfer orders, since they as well as Executive Branch officials are relieved from any liability for actions taken in good faith in reliance on the IEEPA.

Executive order prohibiting the prosecution of any claims against Iran arising from the hostage seizure, and terminating any previously instituted judicial proceedings based on such a claim, is within the President's authority under the IEEPA and the Hostage Act. The order does not purport to preclude any claimant from petitioning Congress for relief in connection with his claim, nor could it constitutionally do so.

Provisions of executive order blocking property of the former Shah's estate and that of his close relatives, and requiring all persons subject to the jurisdiction of the United States to submit to the Secretary of the Treasury information about this property to be made available to the government of Iran, are within the President's authority under the IEEPA. Proposed order also directs the Attorney General to assert in appropriate courts that claims of Iran for recovery of this property are not barred by foreign sovereign immunity or act of state doctrines, and asserts that all Iranian decrees relating to the former Shah and his family should be enforced in courts of the United States.

The President has constitutionally and congressionally conferred authority to enter an agreement designating the Iran-United States Claims Tribunal as the sole forum for determination of claims by the United States or its nationals against Iran, and to confer upon the Tribunal jurisdiction over claims against the United States.

January 19, 1981

THE PRESIDENT
THE WHITE HOUSE

MY DEAR MR. PRESIDENT: I have been asked for my opinion concerning the legality of certain actions designed to resolve issues arising from the detention in Iran of 52 American hostages, including the diplomatic and consular staff in Tehran.

An international agreement has been reached with Iran. The agreement, which consists of four separate documents, commits the United States and Iran to take specified steps to free the hostages and to resolve specified claims between the United States and its nationals and Iran and its nationals. These documents embody the interdependent commitments made by the two parties for which Algeria has been acting as intermediary.

The first document is captioned "Declaration of the Government of the Democratic and Popular Republic of Algeria" (Declaration). The Declaration provides, first, for non-intervention by the United States in the internal political and military affairs of Iran.

Second, the Declaration provides generally for return of Iranian assets. The transfer utilizes the Central Bank of Algeria as escrow agent and the Bank of England in London as depositary: their obligations and powers are specified in two other documents, the "Escrow Agreement" and the "Depositary Agreement." Separate timetables and conditions are described for assets in the Federal Reserve Bank of New York (Fed), in foreign branches of United States banks, and in domestic branches of United States banks, and for other financial assets and other property located in the United States and abroad. The transfer of the assets in the Fed and in the foreign branches to the Bank of England is scheduled to take place first. Upon Iran's release of the hostages, the Central Bank of Algeria, as escrow agent, shall direct the Bank of England, under the terms of the Escrow and Depositary Agreements, to disburse the escrow account in accordance with the undertakings of the United States and Iran with respect to the Declaration.

The transfer from the Central Bank of Algeria to Iran of the assets presently in the domestic branches will take place upon Iran's establishment with the Central Bank of Algeria of a Security Account to be used for the purpose of paying claims against Iran in accordance with a Claims Settlement Agreement set forth in the fourth document, which is captioned "Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran" (Claims Settlement Agreement). The Claims Settlement Agreement provides for the establishment of an Iran-United States Claims Tribunal, which will have jurisdiction to decide three categories of claims: (1) claims by United States nationals against Iran and claims by Iranian nationals against the United States, and counterclaims arising out of the same transaction or occurrence, for claims and counterclaims outstanding on the date of the Agreement;[1] (2) Official claims of the governments of the United States and Iran against each other arising out of contracts for the purchase and sale of goods and services; and (3) any dispute as to the interpretation or performance of any provision of the Declaration.

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[1] Two categories of claims are specifically excluded: (1) claims relating to the seizure or detention of the hostages, injury to United States property or property within the compound of the embassy in Tehran, and injury to persons or property as a result of actions in the course of the Islamic Revolution in Iran which were not actions of the government of Iran and (2) claims arising under the terms of a binding contract specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts.

Third, the Declaration provides for nullification of trade sanctions against Iran and withdrawal of claims now pending in the International Court of Justice. The United States also agrees not to prosecute its claims and to preclude prosecution by a United States national or in the United States courts of claims arising out of the seizure of the embassy and excluded by the Claims Settlement Agreement.

Fourth, the Declaration provides for actions by the United States designed to help effectuate the return to Iran of the assets of the family of the former Shah.

A series of executive orders has been proposed to carry out the domestic, and some foreign, aspects of the international agreement. It is my opinion that under the Constitution, treaties, and laws of the United States you, your subordinates, the Fed, and the Federal Reserve Board are authorized to take the actions described in the four documents constituting the international agreement and in the executive orders.[2]

I shall first examine the proposed executive orders and consider them as to form and legality. Subsequently I shall consider certain questions which arise from other proposed actions and documents related thereto.

1. The first proposed executive order is captioned "Direction Relating to Establishment of Escrow Accounts." Under it, the Secretary of the Treasury is authorized to direct the establishment of an appropriate escrow agreement with the Bank of England and with the Central Bank of Algeria to provide as necessary for distribution of funds in connection with the release of the hostages. The Escrow Agreement provides, among other things, that certain assets in which Iran has an interest shall be credited by the Bank of England to an escrow account in the name of the Central Bank of Algeria and transferred to Iran after the Central Bank of Algeria receives certification from the Algerian government that the 52 hostages have safely departed from Iran.

The International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701–1706 (Supp. I 1977), provides you with authority, during a declared national emergency, to direct transactions and transfers of property in which a foreign country has an interest under such regulations as you may prescribe. As the proposed order recites, such an emergency has been declared. IEEPA was the authority for the blocking order of November 14, 1979, Executive Order No. 12,170, which asserted control over Iranian government assets. Moreover, the statute known as the Hostage Act, 22 U.S.C. § 1732, authorizes the President, when American citizens are unjustly deprived of liberty by a foreign government, to use such means, not amounting to acts of war, as he may think "necessary and proper" to bring about their release. The phrase "necessary and proper" is, of course, borrowed from the Constitution, and has been construed as providing very broad discretionary powers for legitimate ends. U.S. Const. Art. I, § 8, cl. 18; *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Establishment of the escrow account is directed to the release of the hostages. This order thus falls within your powers under these Acts.[3]

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[2] Documents testifying to the adherence to the agreement by both the United States and Iran will also be executed; these documents present no substantive legal issues.

It is approved as to form and legality.

2. The second proposed executive order is captioned "Direction to Transfer Iranian Government Assets." The Fed is directed to transfer to its account at the Bank of England, and then to the escrow account referred to in paragraph 1, the assets of the government of Iran, as directed by the Secretary of the Treasury. The order also revokes the authorization for, and nullifies all interests in, the frozen Iranian government property except the interests of Iran and its agents. The effect of this order will be to void the rights of plaintiffs in any possible litigation to enforce certain attachments and other prejudgment remedies that were issued against the blocked assets following the original blocking order.

I believe that this provision is lawful for several reasons. I am informed, first, that the Iranian funds on deposit in the Fed are funds of the Bank Markazi, the Central Bank of Iran. As such, they are clearly not subject to attachment. The Foreign Sovereign Immunities Act of 1976 specifically states that the property of a foreign central bank held for its own account shall be immune from attachment and execution unless that immunity has been explicitly waived. 28 U.S.C. § 1611(b). It is my view that there has been no such waiver.

Even assuming, *arguendo*, that the attachments are not precluded by 28 U.S.C. § 1611(b), there is power under IEEPA to nullify them or to prevent the exercise of any right under them. Under IEEPA, the President has authority in time of emergency to prevent the acquisition of interests in foreign property and to nullify new interests that are acquired through ongoing transactions. The original blocking order delegated this power to the Secretary of the Treasury, who promulgated regulations prohibiting the acquisition, through attachment or any other court process, of any new interest in the blocked property. The effect of these regulations was to modify both the substantive and the procedural law governing the availability of prejudgment remedies to creditors of Iran. The regulations contemplated that provisional remedies might be permitted at a later date but provided that any unauthorized remedy would be "null and void." 31 C.F.R. § 535.203(e).

Subsequently, all of the attachments and all of the other court orders against the Iranian assets held by the Fed were entered pursuant to a general license or authorization given by the Secretary of the Treasury effective November 23, 1979. This authorization, like all authorizations issued under the blocking regulations, may be revoked at any time in accordance with 31 C.F.R. § 535.805, which expressly provides that any authorization issued under the blocking order could be "amended, modified, or revoked at any time." *See Orvis* v. *Brownell,* 345 U.S. 183 (1953). The regulations did not purport to authorize any transaction to the extent that it was prohibited by any other law (other than IEEPA), such as the Foreign Sovereign Immunities Act.[4] 31 C.F.R. § 535.101(b).

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[3] Although I do not specifically discuss the applicability of the Hostage Act to the other proposed orders described in this opinion, I believe that it generally supports their issuance.

Upon revocation, the exercise or prosecution of any interests created by the outstanding attachments and other orders will be unauthorized. The orders themselves will no longer confer any enforceable right upon the creditors. Indeed, because IEEPA expressly grants to the President a power of nullification, the interests created by these provisional remedies are themselves subject to nullification, in addition to nullification by the revocation of the underlying authorization. In this respect the President's power under IEEPA is analogous to his constitutional power to enter into international agreements that terminate provisional interests in foreign property acquired through domestic litigation if necessary in the conduct of foreign affairs. *See The Schooner Peggy,* 5 U.S. (1 Cranch) 103 (1801). The nullification of these interests is an appropriate exercise of the President's traditional power to settle international claims. *United States* v. *Pink,* 315 U.S. 203 (1942); *United States* v. *Belmont,* 301 U.S. 325 (1937).

Upon the direction of the Secretary of the Treasury, the Fed will be free to transfer the Iranian assets; the attachments and other prejudgment encumbrances will have been rendered unenforceable by the contemporaneous change in law. Moreover, the Fed may comply with the Secretary's directive without litigating in advance the issue of the Secretary's authority to nullify the provisional interests. IEEPA explicitly states, and the proposed order affirms, that "[n]o person shall be held liable in any court . . . for anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, [IEEPA] or any regulation, instruction, or direction issued under [IEEPA]." 50 U.S.C. § 1702(a)(3). I believe that Congress intended this provision to relieve holders of foreign property, as well as individuals administering or carrying out orders issued pursuant to IEEPA, from any liability for actions taken in good faith in reliance on IEEPA and presidential directives issued under IEEPA. This provision protects not only the Fed and the Federal Reserve Board but Executive Branch officials as well. In my opinion, this provision is valid and effective for that purpose.

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[4] In *New England Merchants National Bank* v. *Iran Power Generation and Transmission Co.,* 502 F. Supp. 120 (S.D.N.Y. 1980), the district court took the position that the freeze order under IEEPA took precedence over the Foreign Sovereign Immunities Act, thus removing Iran's immunity. Assuming, *arguendo,* the correctness of that position, the legal effect of the totality of actions discussed herein would be to reinstate Iran's immunity, thereby removing the *ratio decedendi* of the district court's decision.

Similarly, the Secretary himself is empowered, in my opinion, to nullify these provisional interests and to license the transfer of the assets without submitting the issue to litigation and without insisting that the Fed refuse any transfer until all objections to the transfer have been definitively rejected by the courts. As noted, the interests, if any, created by these prejudgment remedies were created upon the condition that the authority for the underlying transactions might be revoked "at any time"; and that condition may be invoked without delay. The powers that the Constitution gives and the Congress has given the President to resolve this kind of crisis could be rendered totally ineffective if they could not be exercised expeditiously to meet opportunities as they arise. The primary implication of an emergency power is that it should be effective to deal with a national emergency successfully. *United States* v. *Yoshida International, Inc.*, 526 F.2d 560, 573 (C.C.P.A. 1975).

Moreover, the Fed may transfer the assets before the outstanding court orders have been formally vacated. When a supervening legislative act expressly authorizes a course of conduct forbidden by an outstanding judicial order, the new legislation need not require the persons subject to it to submit the matter to litigation before pursuing the newly authorized course. *See Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855). I believe that this case is closely on point. A valid executive order has the force of a federal statute, superseding state actions to the extent that it is inconsistent. *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159, 166 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). Thus, the holding of the *Wheeling* case applies here.

The order is approved as to form and legality, and actions taken consistent with and pursuant to it will be lawful and valid.

3. The third proposed executive order is captioned "Direction to Transfer Iranian Government Assets Overseas." In general, it directs branches of United States banks outside the country to transfer Iranian government funds and property to the account of the Fed in the Bank of England. The transfer is to include interest at commercially reasonable rates from the date of the blocking order. The Secretary of the Treasury shall determine when the transfers shall take place. Any banking institution that executed a set-off against Iranian funds after entry of the blocking order is directed to cancel the set-off and to transfer the funds in the same manner as the other overseas deposits.

The Iranian funds in the branches of American banks overseas were subject to the November 1979 blocking order. Subsequently the Secretary of the Treasury licensed foreign branches and subsidiaries of American banks to set off their claims against Iran or Iranian entities by debit to the blocked accounts held by them for Iran or Iranian entities. 31 C.F.R. §535.902. As a result of this license, American banks with branches overseas set off various debts owing to them by Iran and Iranian entities. I understand that most of the debts were loans originally made from offices in the United States and that most of the overseas deposits were in branches located in the United Kingdom. The banks with overseas Iranian accounts set off amounts owing not only to them directly but to other banks with whom they were participants in syndicated loans. The banks have acted on the assumption that any loan made to Iran or an Iranian entity could be set off against any account of Iran or an Iranian entity or enterprise on the theory that, as a result of the control of the Iranian economy by the government of Iran and nationalization of private enterprises, all such entities and enterprises were the same party for purpose of setting off debts. In addition, the banks accelerated the amounts due on loans that were in default, and, under the doctrine of anticipatory breach, set off loans that had not come due.

The blocking order delegated to the Secretary of the Treasury the authority to license the set-offs to the extent that the executive order prevented them. The license did not, however, determine whether the set-offs were valid under any other law. 31 C.F.R. § 535.101(b). I understand that Iran and its entities are contesting in litigation overseas whether the set-offs are lawful. The issues include the proper situs of the debts, identity of the parties, the propriety of acceleration, and the anticipation of breach.

IEEPA authorizes the President, under such regulations as he may prescribe, to nullify and void *transactions* involving property in which a foreign country has an interest and to nullify and void any *right* respecting property in which a foreign country has an interest. 50 U.S.C. § 1702. Either analysis is appropriate here: Iran had an interest in the original set-off transaction and continues to have an interest both in the amounts in the accounts which have and have not been set off. The latter, as noted, are the subject of litigation abroad. *See* 31 C.F.R. §§ 535.311–312. *Cf. Behring International* v. *Miller,* 504 F. Supp. 552 (D.N.J. 1980) (holding that Iran continues to have interest in a trust account created to pay debt). The very use of the words "nullify" and "void" persuades me that Congress intended to authorize the President to set aside preexisting transactions.[5]

As noted, the order also requires the overseas banks, when transferring the Iranian assets, to include interest on those assets from November 14, 1979, at commercially reasonable rates. I understand that in most cases the accounts in overseas branches of American banks are interest-bearing. To the extent that they are not, such interest represents the benefit realized by the banks from holding the blocked Iranian assets which, under the law of restitution, should accrue to the owners of the assets. *Cf. Phillips Petroleum Co.* v. *Adams,* 513 F.2d 355 (5th Cir.), *cert. denied,* 423 U.S. 930 (1975). As such, the interest or benefit realized by the banks is property in which Iran has an interest.[6]

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[5] I believe that the present case is distinguishable in several respects from that in *Brownell* v. *National City Bank,* 131 F. Supp. 60 (S.D.N.Y. 1955). There, the district court concluded that the mere revocation of a license did not serve to void a preexisting and apparently uncontested set-off; the bank, moreover, had no opportunity to recoup its potential loss by bringing the loan current.

For these reasons, I believe that you are thus authorized under IEEPA to compel the transfer of both principal and interest to the Federal Reserve account at the Bank of England as provided by the order and to nullify or prevent the exercise of any interests in this property by anyone other than Iran. I also believe, as discussed in paragraph 2 above, that 50 U.S.C. § 1702(a)(3) relieves from liability anyone taking action in good faith under this executive order.[7]

The proposed order is approved as to form and legality, and actions taken consistent with and pursuant to it will be lawful and valid.

4. The fourth proposed executive order is captioned "Direction to Transfer Iranian Government Assets Held by Domestic Banks." The proposed order directs American banks in the United States with Iranian deposits to transfer them, including interest from the date of blocking at commercially reasonable rates, to the Fed, which will hold the funds subject to the direction of the Secretary of the Treasury.

As discussed in paragraphs 2 and 3, the President has power under IEEPA to direct the transfer of funds of Iran, including interest, and to nullify or prevent the exercise of any interests of anyone other than Iran in Iranian property. Actions taken in good faith pursuant to this order will be, as discussed above, immune from liability.

The order is approved as to form and legality, and actions taken consistent with and pursuant to it will be lawful and valid.

5. The fifth proposed executive order is captioned "Direction to Transfer Iranian Government Financial Assets Held by Non-Banking Institutions." This order is similar to the order described in paragraph 4 except that it requires the transfer to the Fed of funds and securities held by non-banking institutions. The President has the power to direct the transfer of funds and securities of Iran held by non-banking institutions, and actions taken in good faith pursuant to this order shall likewise enjoy the immunity from liability as reflected in 50 U.S.C. § 1702(a)(3).

The proposed order is approved as to form and legality, and actions taken consistent with and pursuant to it will be lawful and valid.

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[6] *See also* Art. VII(2)(b) of the Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, United States-Iran, 8 U.S.T. 901, 905, T.I.A.S. No. 3853.

[7] *Cf. Cities Service Co.* v. *McGrath,* 342 U.S. 330, 334–36 (1952). It is my opinion that a person who has taken action in compliance with this executive order and is subsequently finally required by any court to pay amounts with respect to funds transferred pursuant to this executive order will have the right as a matter of due process to recover such amount from the United States to the extent of any double liability.

6. The sixth proposed executive order is captioned "Direction to Transfer Certain Iranian Government Assets." The order would require anyone in possession or control of property owned by Iran, not including funds and securities, to transfer the property as directed by the Iranian government. The order recites that it does not relieve persons subject to it from existing legal requirements other than those based on IEEPA. It does, however, nullify outstanding attachments and court orders in the same manner as does the order discussed in paragraph 2.

For the reasons discussed in the preceding paragraphs, the President has power under IEEPA to order the transfer of property owned by Iran as directed by Iran and to nullify outstanding attachments and court orders related to such property. Actions taken in good faith pursuant to this order shall likewise enjoy the immunity from liability as reflected in 50 U.S.C. § 1702(a)(3).

The order is approved as to form and legality, and actions taken consistent with and pursuant to it will be lawful and valid.

7. The seventh proposed executive order is captioned "Revocation of Prohibitions against Transactions Involving Iran." It revokes the prohibitions of Executive Order No. 12,205 of April 7, 1980; Executive Order No. 12,211 of April 17, 1980; and Proclamation 4702 of November 12, 1979. The two executive orders limited trade with and travel to Iran. The proclamation restricted oil imports from Iran. It is my understanding that although the prohibitions are revoked, the underlying declarations of emergency remain in effect.

The order is approved as to form and legality.

8. The eighth proposed executive order is captioned "Non-Prosecution of Claims of Hostages and for Actions at the United States Embassy and Elsewhere." The order directs the Secretary of the Treasury to promulgate regulations prohibiting persons subject to U.S. jurisdiction from prosecuting in any court or elsewhere any claim against Iran arising from the hostage seizure on November 4, 1979, and the occupation of the embassy in Tehran, and also terminating any previously instituted judicial proceedings based upon such claims.

The President has the power under IEEPA and the Hostage Act to take steps in aid of his constitutional authority[8] to settle claims of the United States or its nationals against a foreign government.[9] Thus, he has the right to license litigation involving property in which a foreign national has an interest, as described in paragraph 2. That license can be suspended by the Executive acting alone. *New England Merchants National Bank* v. *Iran Power Generation and Transmission Co.*, 508 F. Supp. 47 (S.D.N.Y., 1980) (Duffy, J.). *But see National Airmotive Corp.* v.

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[8] *See, e.g.*, Restatement (Second) of Foreign Relations Law of the United States § 213 (1965).

[9] IEEPA was drafted and enacted with the explicit recognition that the blocking of assets could be directly related to a later claims settlement. H. R. Rep. No. 459, 95th Cong., 1st Sess. 17 (1977); S. Rep. No. 466, 95th Cong., 1st Sess. 6 (1977). *See* 50 U.S.C. § 1706(a)(1) (authorizing continuation of controls, after the emergency has ended, where necessary for claims settlement purposes).

*Government and State of Iran*, 499 F. Supp. 401 (D.D.C., 1980) (Greene, J.).[10]

The order is approved as to form and legality.

9. The final proposed executive order is captioned "Restrictions on the Transfer of Property of the Former Shah of Iran." It invokes the blocking powers of IEEPA to prevent transfer of property located in the United States and controlled by the Shah's estate or by any close relative until litigation surrounding the estate is terminated. The order also invokes the reporting provisions of IEEPA, 50 U.S.C. § 1702(a)(2), to require all persons subject to the jurisdiction of the United States to submit to the Secretary of the Treasury information about this property to be made available to the government of Iran. The property involved is property in which "[a] foreign country or a national thereof" has an interest. Restrictions on transfer and reporting requirements therefore fall within the authority provided by IEEPA.

The order would further direct me, as Attorney General, to assert in appropriate courts that claims of Iran for recovery of this property are not barred by principles of sovereign immunity or the act of state doctrine. I have previously communicated to you and to the Department of State my view to this effect (based on advice furnished to me by the Office of Legal Counsel and the Civil Division of this Department) and will so assert in appropriate proceedings. The proposed order also recites that it is the position of the United States that all Iranian decrees relating to the assets of the former Shah and his family should be enforced in our courts in accordance with United States law.

The proposed order is approved as to form and legality.

10. The other questions relate to the Claims Settlement Agreement. I conclude that you have the authority to enter an agreement designating the Iran-United States Claims Tribunal as the sole forum for determination of claims by United States nationals or by the United States itself against Iran and to confer upon the Tribunal jurisdiction over claims against the United States, including both official contract claims and disputes arising under the Declaration.

The authority to agree to the establishment of the Tribunal as an initial matter cannot be challenged. The Claims Settlement Agreement falls squarely within powers granted to the Executive by the Constitution, by treaty, and by statute.

As a step in the reestablishment of diplomatic relations with Iran, the Claims Settlement Agreement represents an appropriate exercise of the President's powers under Article II of the Constitution to conduct foreign relations. Moreover, by Article XXI(2) of the 1957 Treaty with

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[10] I note that the issue of appropriate compensation for the hostages will be considered by a Commission on Hostage Compensation established by separate executive order. Moreover, this eighth order does not, of course, purport to preclude any claimant from presenting his claim to Congress and petitioning for relief; nor could it constitutionally do so.

Iran, the Senate gave its agreement for the two nations to settle disputes as to the interpretation or application of the treaty by submission to the International Court of Justice or by any "pacific means." [11] Arbitration by the Iran-United States Claims Tribunal is a pacific means of dispute settlement. Finally, by the Hostage Act, 22 U.S.C. § 1732, Congress has conferred upon the President specific statutory powers applicable to this crisis. The agreement to resolve by arbitration the disputes now obstructing the release of the hostages is a proper exercise of this power.

I note in conclusion the congruence of your constitutional powers and the congressionally conferred authority. In this situation, of course, your authority is at its maximum. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 635–36 (1952) (Jackson, J., concurring).

The specific jurisdiction conferred upon the Tribunal must be further examined. The first category of claims, the private claims based on debts, contracts, expropriations, or other measures affecting property rights, includes both claims by United States nationals against Iran and claims by Iranian nationals against the United States. The former are referrable to the Tribunal under the constitutional authority to settle claims recognized in *United States* v. *Pink,* 315 U.S. 203 (1942), and *United States* v. *Belmont,* 301 U.S. 324 (1937). *See also* Restatement (Second) of Foreign Relations Law of the United States § 213 (1965).[12]

From these claims are excluded claims arising out of the seizure of the embassy and claims on binding contracts providing for dispute resolution solely by Iranian courts. Again, the power to settle claims includes the power to exclude certain claims from the settlement process. *Cf. Aris Gloves, Inc.* v. *United States,* 420 F.2d 1386 (Ct. Cl. 1970). Moreover, the exclusion is not intended to be a final settlement or determination of these claims. I understand that the claims based on the seizure will be given separate consideration, *see* note 10 *supra.* I note also that the exclusion of the claims on binding contracts that provide the exclusive procedure for dispute resolution does not adversely affect any option that these claimants would have had prior to the hostage crisis and all the actions taken in response to it. These claimants are not disadvantaged by the Claims Settlement Agreement; as to them, the status quo as of the time that the hostages were taken is merely preserved.

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[11] Art. XXI(2) provides:

> Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means.

Because the Treaty provides for peace and friendship between the two nations, trade and commercial freedom, protection and security of nationals, prompt and just compensation for the taking of property, and the absence of restrictions on the transfer of funds, the disputes to be referred to the Tribunal are disputes "as to the interpretation or application of the . . . Treaty."

[12] Here again, your constitutional powers are supplemented by statute. *See* note 9 *supra.*

The latter claims in the first category, the claims by Iranian nationals against the United States, and also the official claims in the second category by Iran against the United States, are referrable to the Tribunal for adjudication under the same authority. The President's power to refer these claims to binding arbitration as part of an overall settlement of our disputes with Iran is within the authority conferred on him by the Treaty and the Hostage Act and is also within his sole authority under Article II of the Constitution. Any award made by the Tribunal against the United States would create an obligation under international law. Such obligations have invariably been honored by the Congress in our constitutional system.

The remainder of the claims in this second category are official claims of the United States against Iran. The submission of the claims to the Tribunal is a matter for the Executive's sole determination in the conduct of foreign relations.

Finally, jurisdiction over the third category of claims, consisting of disputes as to the interpretation or performance of the Declaration, is appropriately conferred upon the Tribunal incident to the exercise of the power to agree to the Declaration in the first instance.

For these reasons, I conclude that the United States may enter into the international agreement and that you have legal authority to issue all of these documents and executive orders.

Respectfully,
BENJAMIN R. CIVILETTI

# Review of Domestic and International Legal Implications of Implementing the Agreement with Iran

While a number of the presidential actions implementing the agreement with Iran are likely to be the subject of domestic legal challenge, a review of the authorities previously relied on by the Office of Legal Counsel and by the Attorney General in his January 19, 1981, opinion leads to the conclusion that those actions are well within the President's power under the Constitution and applicable statutes and treaties.

A persuasive argument can be made that the agreement with Iran was procured by the threat or use of force in violation of principles of international law, and is thus void *ab initio* under Article 52 of the Vienna Convention on the Law of Treaties. As the party coerced, the United States may decide whether it wishes to repudiate the agreement, though it would be desirable to seek confirmation of the appropriateness of that action from an independent legal body, such as the International Court of Justice. Private litigants would have no standing to contest in United States courts any decision that the President may make in this respect.

Should the United States decide to repudiate the agreement with Iran, a number of questions would arise relating to the disposition of Iranian assets already transferred to the escrow account pursuant to the agreement, or still frozen in domestic accounts.

January 29, 1981

## MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This responds to your request for our views regarding certain legal questions arising out of implementation or nonimplementation of the agreement of January 19, 1981, between the United States and Iran, which resulted in the release of the 52 Americans held hostage in Iran. The first section of the memorandum discusses the legal issues that are likely to be raised in litigation challenging the agreement. The second section sets forth the legal basis for securing a judicial determination that the agreement is void. The third section identifies and analyzes the impact that nonimplementation might have on Americans with claims against Iran and the litigation that could be expected to arise out of a decision not to implement the agreement.[1]

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[1] The agreement adhered to by the United States and Iran is set forth primarily in two documents, captioned "Declaration of the Government of the Democratic and Popular Republic of Algeria" (Declaration), and "Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran" (Claims Settlement Agreement). Other documents subsidiary to these documents will be described as necessary. The overall agreement was implemented in most particulars through a series of executive orders issued by President Carter on January 19, 1981. Exec. Order Nos. 12,276–12,285, 3 C.F.R. 104–118 (1982).

## I. Domestic Legal Issues

The major legal issues that we expect to be raised in litigation challenging the implementation of the agreement, if the United States chooses that course, concern the scope and limits of presidential power to deal with the hostage crisis. The following presidential actions are likely to be challenged as having been taken without legal authority:

1. Settlement of claims of American citizens against Iran by submission of claims to binding arbitration by an international tribunal;
2. Nullification of outstanding attachments against property of Iran;
3. Ordering the return of the frozen assets to Iran;
4. Prohibition against the prosecution of any claim arising out of the seizure and detention of the 52 American citizens; and
5. Blocking the transfer of the former Shah's property located in the United States.

The legal authority for each of these actions and relevant legal issues are discussed below.

### *A. Settlement of Claims by Submission to Binding Arbitration*

It is likely that if the agreement is implemented, a fundamental issue will be the President's authority to settle claims of American citizens by agreeing to submit those claims to binding arbitration. Because of the legal precedent and historical practice supporting this action, any challenge on this ground is not likely to prevail.

The authority of the President under Article II of the Constitution to enter into executive agreements with other nations to settle claims has been explicitly upheld by the Supreme Court. *United States* v. *Belmont*, 301 U.S. 324, 330–31 (1937); *United States* v. *Pink*, 315 U.S. 203 (1942). As Justice Frankfurter observed in his concurring opinion, "That the President's control of foreign relations includes the settlement of claims is indisputable." 315 U.S. at 240. *See also* Restatement (Second) of Foreign Relations Law of the United States § 213 (1965). *Belmont* and *Pink* upheld the Litvinov Assignment, by which outstanding Soviet claims were assigned to the United States by a single exchange of letters between the President and the Soviet Foreign Minister. Both cases emphasized the Executive's exclusive constitutional power to recognize foreign governments and to normalize diplomatic relations with them, and viewed claims settlements as necessary incidents of the Executive's foreign relations power. *See generally United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

This exercise of the President's foreign relations power is also supported by the Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, United States-Iran, Art. XXI(2), 8 U.S.T. 901, T.I.A.S. No. 3853. In ratifying that treaty, the Senate gave its approval for the two nations to settle disputes regarding interpretation of the treaty by submission to the International Court of Justice or by any pacific means for settling these disputes. Because the treaty provides for peace and friendship between the two nations, trade and commercial freedom, protection and security of nationals, prompt and just compensation for the taking of property, and the absence of restrictions on the transfer of funds, the private claims expressed by the United States and referred to the Tribunal are disputes between the United States and Iran "as to the interpretation or application of the . . . Treaty."

Support may be drawn as well from the President's statutory power under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701 *et seq.* (Supp. I 1977). That statute, which authorized the November 14, 1979, blocking of Iranian assets, was drafted in explicit recognition that the blocking of assets could have as a primary purpose their preservation for later claims settlement. H.R. Rep. No. 459, 95th Cong., 1st Sess. 17 (1977); S. Rep. No. 466, 95th Cong., 1st Sess. 6 (1977). Thus, § 1706(a)(1) authorizes the continuation of controls after the underlying emergency has ended, where "necessary on account of claims involving such country or its nationals." The need to provide a means for orderly termination of a blocking of assets once the emergency has passed implies presidential power to resolve the plethora of claims that will invariably arise.

The law known as the Hostage Act, 22 U.S.C. § 1732, also provides an independent statutory authority for the settlement of claims by executive agreement when the settlement is in connection with negotiations for the release of American citizens wrongfully detained by a foreign government. The Act confers upon the President the broad power to "use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate [their] release."

Historical practice also reflects the existence of presidential power to settle claims. Although claims settlements have often been concluded by treaty or convention, historical examples abound of settlements through executive agreement. Numerous lump-sum agreements have settled claims of American nationals against foreign nations. *See, e.g.*, Claims Settlement Agreement, July 16, 1960, United States-Poland, 11 U.S.T. 1953, T.I.A.S. No. 4545; Claims Settlement Agreement, July 19, 1948, United States-Yugoslavia, 62 Stat. 2658, T.I.A.S. No. 1803. History also provides numerous examples of claims settlements through executive agreements that establish international arbitrations rather than provide a lump sum. *See generally* W. McClure, International Executive Agreements 52-56 (1941). In 1935, a congressional study identified 40 arbitration agreements entered into by the Executive between 1842 and 1931 which were not submitted to the Senate for advice and consent. 79 Cong. Rec. 969-71 (1935).[2]

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[2] The corollary to the power to settle claims of American citizens by submitting the claims to binding arbitration is the power to prohibit any prosecution of claims in court.

### *B. Nullification of Outstanding Attachments*

Pursuant to the agreement with Iran, President Carter issued Executive Order No. 12,277, 3 C.F.R. 105 (1982), which revoked the authorization for, and nullified all interests in, the frozen Iranian government property except the interests of Iran and its agents. The effect of this order was to void the rights of plaintiffs in any possible litigation to enforce certain attachments and other prejudgment remedies that were issued against the blocked assets following the original blocking order. In implementing the agreement, the United States is likely to face numerous challenges by the attachment holders against the transfer of the attached funds to the Federal Reserve Bank (Fed) and ultimately to Iran. The attachment holders can be expected to argue that with the issuance of the attachment orders, they acquired a vested right to prove their claims and recover against the attached property and that this right may not be taken away by the Executive. We believe that the attachment holders will not succeed in preventing the transfer of the attached funds to the Federal Reserve Bank, although the litigation, including the appeals, will make difficult compliance with the United States' pledge to Iran to effect the transfer within six months.

We believe that the law is clear that the President had the power to nullify the attachments.[3] Under IEEPA, the President has authority in time of emergency to prevent the acquisition of interests in foreign property and to nullify new interests that are acquired through ongoing transactions. The original blocking order delegated this power to the Secretary of the Treasury, who promulgated regulations prohibiting the acquisition, through attachment or any other court process, of any new interest in the blocked property. The effect of these regulations was to modify both the substantive and the procedural law governing the availability of prejudgment remedies to creditors of Iran. The regulations contemplated that provisional remedies might be permitted at a later date but provided that any unauthorized remedy would be "null and void." 31 C.F.R. § 535.203(e).

Subsequently, all of the attachments and all of the other court orders against the Iranian assets held by the Fed were entered pursuant to a general license or authorization given by the Secretary of the Treasury effective November 23, 1979. This authorization, like all authorizations issued under the blocking regulations, was revocable at any time in accordance with 31 C.F.R. § 535.805, which expressly provides that any authorization issued under the blocking order could be "amended, modified, or revoked at any time." Because the original authorization was subject to the reservation that it might be revoked at any time, the President could lawfully extinguish any interest created by the attachment by exercising that reservation. *See Orvis* v. *Brownell,* 345, U.S. 183 (1953).

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[3] It is also our opinion that, in any event, the attachments were void because they were barred by the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.* Two district courts have adopted that view. *E-Systems, Inc.* v. *Islamic Republic of Iran,* 491 F. Supp. 1294 (N.D. Tex. 1980); *Reading & Bates Corp.* v. *National Iranian Oil Co.,* 478 F. Supp. 724 (S.D.N.Y. 1979). *Contra, Behring Int'l, Inc.* v. *Imperial Iranian Air Force,* 475 F. Supp. 383 (D.N.J. 1979). *See also New England Merchants Nat'l Bank* v. *Iran Power Generation & Transmission Co.,* 502 F. Supp. 120 (S.D.N.Y. 1980) (holding that the Foreign Sovereign Immunities Act barred prejudgment attachment of Iranian assets but that the operation of the Act was suspended by Executive Order No. 12,170's freezing the assets).

A related issue that may be raised by holders of attachments against funds that have already been transferred to Iran is the legality of a transfer without prior hearing and judicial dissolution of outstanding attachment orders and preliminary injunctions. We believe that no prior hearing was required because the precarious nature of the negotiations warranted swift presidential action to achieve the resolution of the emergency. *United States* v. *Yoshida Int'l, Inc.,* 526 F.2d 560, 573 (C.C.P.A. 1975). Moreover, because the authorization for attachments could be revoked at any time, the attachment holders, under traditional due process analysis, were not entitled to a prerevocation hearing. *Cf. Bishop* v. *Wood,* 426 U.S. 341 (1976). Finally, it was not necessary for the government to obtain a judicial dissolution of the attachments before transferring the assets because presidential action in revoking the authorization for the attachments removed the underlying legal predicate for the attachment orders and expressly authorized the conduct that had been previously forbidden by the attachment order. *See Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 59 U.S. (18 How.) 421 (1855).[4]

### *C. Return of the Frozen Assets to Iran*

Pursuant to the agreement, the frozen assets held by the Fed, as well as the frozen assets held by overseas branches of United States banks (less payments on outstanding loans and the amount held in escrow to cover disputed amounts of unpaid principal and interest) have already been returned to Iran. The agreement also provides that the remaining frozen assets in the United States will be returned upon establishment of a security account to satisfy awards made by the international arbitral tribunal. This eventual return of the bulk of the frozen assets to Iran will probably give rise to litigation challenging the President's authority to order such a return. In our opinion, presidential authority to issue such an order is clear.

Under IEEPA, the President is empowered to "direct and compel . . . any . . . transfer [or] withdrawal . . . of . . . any property in which any foreign country or national has an interest." 50 U.S.C. § 1702(a)(1)(B). Upon nullification of any provisional remedies encumbering the assets, the President was free to exercise his power to order the transfer of the assets, which was in effect the withdrawal of the assets by Iran.

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[4] Because these assets have already been transferred from the control of the United States to Iran, litigation concerning the exercise of this power will be limited to defense on a show cause order issued against federal officials involved in directing or executing these actions.

### *D. Prohibition of Prosecution of Hostage Claims*

President Carter, acting pursuant to the agreement, has ordered the Secretary of the Treasury to promulgate regulations prohibiting the prosecution of any claims arising out of the seizure of the United States embassy in Iran and the subsequent detention of the American hostages. This prohibition is a sensitive issue that is likely to be challenged to be without authority, as well as a Fifth Amendment "taking" without just compensation and a denial of equal protection.

As discussed above, the President has the power under IEEPA and the Hostage Act to take steps in aid of his constitutional authority [5] to settle claims of the United States or its nationals against a foreign government. Thus, he has the right to license litigation involving property in which a foreign national has an interest. That license can be suspended by the Executive acting alone. *New England Merchants National Bank* v. *Iran Power Generation & Transmission Co.,* 508 F. Supp. 47 (S.D.N.Y. 1980) (Duffy, J.). *But see National Airmotive Corp.* v. *Government and State of Iran,* 499 F. Supp. 401 (D.D.C. 1980) (Greene, J.).

The Court of Claims has suggested in dicta that if the President settles a claim for less than "value" for unrelated foreign policy purposes, a taking for public use occurs. *See Gray* v. *United States,* 21 Ct. Cl. 340 (1886); *Meade* v. *United States,* 2 Ct. Cl. 224 (1866), *aff'd on other grounds,* 76 U.S. (9 Wall.) 691 (1869). Some of the former hostages or their families may rely on this dicta to seek compensation from the United States, arguing that prohibiting them from prosecuting their claims against Iran amounts to a taking without just compensation. Whatever the vitality of the *Meade* and *Gray* dicta, the hostage claims are distinguishable because they are held by persons whose benefit was a prime purpose of the Administration's negotiations to settle the crisis. Even though that settlement has been reached, the courts are not likely to question whether release could have been secured without settlement or extinction of the tort claims in return. *Cf. Aris Gloves, Inc.* v. *United States,* 420 F.2d 1386 (Ct. Cl. 1970).

The foregoing conclusion regarding the difficulty of identifying loss to the hostages and their families as a result of a claims settlement is reinforced by analysis of their prospects for tort recovery absent an agreement. It seems unlikely that they could recover damages against Iran in United States courts. The Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(5), provides for jurisdiction for an award of tort damages against a foreign state only "for personal injury or death . . .

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[5] *See, e.g.,* Restatement (Second) of Foreign Relations Law of the United States § 213 (1965).

occurring in the United States." Torts to the hostages have not occurred in the United States. In support of claims by their families for such torts as intentional infliction of emotional distress, it could be argued that the statute is ambiguous regarding whether it is enough for the injury to occur here even if the tortious actions do not. The Act's legislative history, however, emphasizes that the immunity of foreign states for their "public" acts as opposed to "commercial or private" acts is to be maintained and that the exception for torts in the United States "is directed primarily at the problem of traffic accidents," suggesting that the wrong must occur here to be actionable. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7, 20 (1976).

Finally, the "takings" question may become moot. If the Hostage Compensation Commission recommends that Congress compensate the hostages and their families and Congress acts upon such a recommendation, there will be no taking.

If the hostages and their families receive no compensation for their claims, they may also argue that in obtaining satisfaction from Iran for the commercial claims but not for the hostage claims, the government denied them equal protection in violation of the Fifth Amendment. In our view, that argument will not prevail. Prohibiting prosecution of the hostage claims can be justified for equal protection purposes as the best "deal" that could be struck with Iran for their release. As such, it is rationally related to and it furthers a legitimate governmental interest and thus does not deny equal protection. The determination by the President that precluding prosecution of the hostage claims facilitated the release of the hostages will not be second-guessed by the courts. *See United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Narenji* v. *Civiletti*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980); *Miller* v. *United States*, 583 F.2d 857, 865 (6th Cir. 1978); *Aris Gloves, Inc.* v. *United States, supra*, 420 F.2d at 1393.

### *E. Freezing the Assets of the Former Shah*

As part of the agreement, President Carter prohibited the transfer of all property and assets located in the United States of the former Shah of Iran, his estate and his close relatives until litigation involving such property is terminated.[6] Although the Shah's family may well challenge this blocking order, we believe that the President's authority to block the Shah's assets is not open to serious question. IEEPA authorizes the President to block transfers of "any property in which any foreign country or a national thereof has any interest," 50 U.S.C. § 1702(a)(1).

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[6] Although the United States will not be directly involved in the litigation, Executive Order No. 12,284 directs the Attorney General pursuant to the agreement to present to the court at the request of Iran's counsel a suggestion of interest stating it is the United States' position that Iran's claim against that property is not barred by either principles of sovereign immunity or the act of state doctrine and that Iranian decrees and acts relating to the assets of the former Shah should be enforced by the courts in accordance with our laws.

The application of this language in the predecessor Trading with the Enemy Act to the assets of foreign nationals was firmly established by the time that IEEPA was enacted and has repeatedly survived constitutional challenge. *See, e.g., Sardino* v. *Federal Reserve Bank of New York,* 361 F.2d 106 (2d Cir.), *cert. denied,* 385 U.S. 898 (1966) (upholding the blocking of assets of Cuban nationals).

### *F. Conclusion*

Although we fully expect legal challenges to be brought to the major actions discussed above, our review of the legal authorities previously relied upon by this Office and the Attorney General in his January 19, 1981, opinion to the President regarding the legality of the actions taken by President Carter convinces us that these actions were well within the power conferred on the President by the Constitution, statutes, and treaty.

## II. Status of the Agreements with Iran under International Law

### *A. The Relevance of "Duress"*

You have asked us to consider whether the agreement reached with Iran is enforceable under international law, a question not previously addressed by this Office or your predecessor as Attorney General.

The primary source for international treaty law is the Vienna Convention on the Law of Treaties (the Convention), which entered into force in 1980. It has been signed by both the United States and Iran, but neither has yet become a party.[7] It is frequently cited by nonparties, however, as a statement of customary international law. At the time that the Secretary of State sent the Convention to the President for transmittal to the Senate, he said: "Although not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice." Ex. L., 92d Cong., 1st Sess. 1 (1971). The Executive did not recommend any reservations to the Convention at the time that it was submitted for advice and consent. This action strongly suggests acceptance by the Executive of the Convention's rules.[8]

The Convention includes a number of articles concerning the invalidity of treaties, the most pertinent of which is Article 52. It addresses the issue of coercion of a state by the threat or use of force:

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[7] It was signed for the United States in 1970 and transmitted to the Senate by President Nixon on November 22, 1971. Ex. L., 92d Cong., 1st Sess. (1971), reproduced at 8 I.L.M. 679.

[8] Hearings on ratification of the Convention were held before the Senate Foreign Relations Committee in 1972 (unpublished), but the Convention was never reported out. The problem was primarily a disagreement between the Senate and President over the authority to make international agreements rather than disagreement about the substance of the Convention.

> A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

At the outset, we would observe that the agreement concluded with Iran is a "treaty" within the meaning of the Convention even though it is designated as an executive agreement for purposes of domestic law. The Convention applies to any written international agreement concluded between states which is governed by international law. Art. 2(1)(a).

The principle expressed in Article 52 is of relatively recent origin. Prior to the establishment of the League of Nations, the use of force in international law was generally accepted. Thus, its use to procure treaties was not considered unlawful. Experience under the League and the U.N. Charter led to a fundamental change.[9] Thus, the International Law Commission (ILC), which drafted the Convention, concluded in 1966 that Article 52 stated an *existing* norm of international law. Reports of the Commission to the General Assembly, [1966] 2 Y.B. Int'l L. Comm'n 169, U.N. Doc. A/6309/Rev. 1/1966, at 246 (hereafter 1966 I.L.C. Yearbook).

We believe that a persuasive argument can be made that the agreement with Iran was "procured by the threat or use of force in violation of the principles of international law" in the U.N. Charter, within the meaning of Article 52. The International Court of Justice (ICJ) found that the initial seizure was privately planned, *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S.* v. *Iran)* 1980 I.C.J. 3, ¶59, but that the government of Iran failed to take any steps to correct the situation. ¶ 68. The continued holding of the hostages by force enjoyed the "seal of official governmental approval." ¶ 73. It was carried on "for the purpose of exerting pressure on the United States," ¶ 74, and "forcing" the United States "to bow to certain demands," ¶ 91. Thus, the initially private action was transmuted into an act of state. ¶ 74 During this period, three of the hostages were held by the Foreign Ministry itself. ¶ 78. In addition, Iran constantly used threats to put the hostages on trial. ¶ 79

The Court did not have occasion to address directly whether Iran's activity was an illegal use of force under U.N. Charter Article 2(4),[10] or whether the United States' attempt to rescue the hostages was proper self-defense to an "armed attack" under Article 51 of the Charter. The Court's opinion, however, uses words such as "armed," "attack," and

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[9] T. O. Elias, The Modern Law of Treaties 170 (1974); McNair, The Law of Treaties 209 (1961); Restatement of Foreign Relations Law of the United States (Revised), tentative draft No. 1, § 338 (1980).

[10] "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

"overrun" in describing both the February and November 1979 takeovers, ¶¶ 14, 17, which strongly suggests that it views Iran's activity as an illegal use of armed force.

The formulation in Article 52 goes beyond the prohibitions embodied in Article 2(4) of the Charter. The Vice President of the ICJ has written: "By emphasizing the *principles* of the Charter, the Article implies all those rules and practices of international law which underlie the Charter provisions and which are of general application today." T.O. Elias, *supra,* at 170–71 (emphasis in original). Thus, use of force to violate other basic Charter provisions is relevant.

One such provision is Article 94, under which each member undertakes to comply with the decision of the ICJ in any case to which it is a party. Since May 24, 1980, Iran has used force to defy such a decision and has therefore used force to violate the principles of the Charter.

Although the basic principles are clear, there is a dearth of judicial interpretation of Article 52 and state practice under it. The ICJ considered it briefly in the *Fisheries Jurisdiction Case (U.K.* v. *Ice.*), 1973 I.C.J. 1. Iceland, which refused to participate in the case, challenged the validity of an exchange of notes with the United Kingdom conferring jurisdiction on the ICJ. It sent a letter to the Court stating that the exchange took place "under extremely difficult circumstances," when the British navy had been using force to oppose Iceland's fishing limit. The ICJ noted that this could be interpreted as a "veiled charge of duress," ¶ 24, but said that the Court could not consider an accusation of that kind without evidence to support it. It said that the history of the jurisdictional agreement revealed that those instruments were freely negotiated by the parties on the basis of "*perfect equality and freedom of decision on both sides.*" *Id.* (emphasis added). The Court recognized that Article 52 represented "contemporary international law" and that "an agreement concluded under the threat of or use of force is void." This statement was made seven years before the Convention came into force.

The Court's finding that the agreement was not void is not conclusive here.[11] Unlike Iceland, which failed to produce evidence to support its charge, we believe that the United States can convincingly establish the presence of duress in procuring the agreement. Indeed, as we have noted, the ICJ has already found that the illegal acts were "for the purpose of exerting pressure on the United States," ¶ 74, and used the words "coercing" and "coercive" in this context. ¶ 87. There would appear to be no reason why, for example, the United States should have dropped its claim for compensation and the claims of the hostages (Declaration ¶ 11)—claims which had already been established in the

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[11] *The Fisheries Jurisdiction Case* can also be viewed as a situation in which the ICJ was, understandably, protecting its own jurisdiction. In this case, by contrast, the Court would protect its jurisdiction by voiding our agreement to withdraw our case against Iran from the ICJ.

ICJ (Judgment of May 24, 1980)—except for the threat against the hostages.

### *B. The Consequences of Duress*

If one accepts this reading of Article 52 and the proposition that it applies to the agreement with Iran, then the conclusion that would follow is not that the United States has to break its agreement but that there never was an agreement: it was void *ab initio.* The question whether such an agreement should be void or merely voidable was considered by the ILC, which indicated the need, as a matter of international policy, to eliminate the consequences of coercion:

> The prohibitions on the threat or use of force contained in the Charter are rules of international law the observance of which is legally a matter of concern to every State. Even if it were conceivable that after being liberated from the influence of a threat or of a use of force a State might wish to allow a treaty procured from it by such means, the Commission considered it essential that the treaty should be regarded in law as void *ab initio.* This would enable the State concerned to take its decision in regard to the maintenance of the treaty in a position of full legal equality with the other State. If, therefore, the treaty were maintained in force, it would in effect be by the conclusion of a new treaty and not by the recognition of the validity of a treaty procured by means contrary to the most fundamental principles of the Charter of the United Nations.

1966 I.L.C. Yearbook at 247.

The ILC analysis raises several pertinent points. First, by clear implication it recognizes that negotiating a treaty under duress is not a violation of international law insofar as the state being subjected to duress is concerned. Thus, the negotiation of the agreement by the United States was proper as a matter of domestic *and* international law.

The ILC analysis also points out that once the coercion has been removed, the coerced party is free, as a matter of international law, to adhere to that treaty. Thus, the President would act in full accord with international law were he now to decide to maintain the agreement. It is not clear what procedure would be preferable to implement a decision to maintain the agreement. Because concluding the agreement was within the Executive's power, a simple statement acknowledging that the United States wishes to maintain the agreement, even after the release of the hostages, should suffice.[12]

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[12] An example of confirming state practice is the 1973 treaty between the Federal Republic of Germany and Czechoslovakia, which replaced the 1938 Munich Agreement and stated it to be "void" because imposed under threat of force. T.O. Elias, *supra*, at 176.

Finally, the President may act, also fully consistent with international (and domestic) law, to repudiate the agreement. If the President wishes to treat the agreements as void, he must treat them as completely so. Article 44(5) of the Convention provides that in cases falling under Article 52, no separation of the provisions of the treaty is permitted. The ILC took the position that this rule was necessary to permit the coerced State to act in a position of full freedom from coercion. 1966 I.L.C. Yearbook at 239.

The consequence of repudiation would be that the United States could, in theory, demand that Iran establish the position that would have existed prior to the agreement. Thus, the United States could ask for return of the money paid over to Iran. Iran, as the party to which coercion is imputable, does not have a similar right. *See* Article 69 of the Convention. Thus, it cannot demand return of the hostages. The United States would then be left with the means of redress available elsewhere through self-help or international adjudication for both the coercive acts and their consequences. 1966 I.L.C. Yearbook at 264. *See* Part III(B), *infra*.

### *C. Litigating the Issue of Duress*

If the United States were to repudiate the agreement, it would be desirable, for reasons of self-protection and international relations, to seek confirmation from an independent body, particularly the ICJ. It should be possible to present the issue to the ICJ relatively quickly. In its judgment of May 24, 1980, the ICJ decided that the form and amount of reparation to be paid by Iran "shall be settled by the Court." Because the Court thus reserved its jurisdiction in the case, the United States could simply move for the designation of a master or other appropriate method for taking evidence of damages. Under the Declaration, the United States agreed to withdraw the case. Iran would thus be forced to raise the Declaration as a bar to halt the case, and the ICJ would be directly presented with the issue of duress.[13]

Iran might choose to secure a determination of this matter from the Iran-United States Claims Tribunal, as established under the Claims Settlement Agreement, by proving our default with regard to paying the balance due to Iran. If the agreement is void and its provisions are inseparable, then the United States would take the position that the Tribunal has no authority. Iran could in theory designate three members and, failing designation by the United States, apply under Article 7 of the UNCITRAL rules, 15 I.L.M. 705, for designation of the remaining arbitrators. *See* Claims Settlement Agreement, Art. III(2). We doubt that Iran could quickly constitute the Tribunal and obtain a judgment, given both the technical and legal problems and the time factors built into the agreement. The Tribunal is given jurisdiction "over any dispute as to the interpretation or performance of any provision" of the Declaration, which conceivably includes whether nonperformance by the United States based on a defense of duress was justified. There may be some way that the United States could make this point to the Tribunal without conceding its authority. If the ICJ ruled first and held the agreement to be a nullity, the Tribunal would be bound by that decision.[14]

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[13] We note that, under 28 U.S.C. §§ 516 and 519, conduct of this litigation is reserved to the Attorney General. The Legal Adviser of the Department of State is, of course, an active participant in such litigation.

A further issue is whether the issue of duress can be adjudicated in our domestic courts. Litigants may attempt to argue that the agreements are void even if the President decides to carry out the agreements; conversely, Iran may argue their validity as a bar to litigation even if the government decides that they are void. We believe that any decision made by the President as to duress is solely his to make and will not be reviewed by the courts, which can be expected to view it as a political question. A plurality of the Supreme Court held that President Carter's decision to terminate the Taiwan Defense Treaty was a political question. *Goldwater* v. *Carter,* 444 U.S. 996 (1979). We believe that the reasons for that decision are even more compelling here because, as explained in the Attorney General's opinion of January 19, the agreement with Iran was an executive agreement, which is the Executive's to make and to terminate and which does not require participation by the Senate. *Cf. Charlton* v. *Kelly,* 229 U.S. 447, 476 (1913); Restatement (Second) of Foreign Relations Law of the United States § 163 (1965).

### *D. Conclusion*

For the reasons set forth above, we conclude that: (1) a persuasive case can be established that the agreement with Iran is void *ab initio* under international law; (2) the negotiation of the agreement was not a violation of international laws; (3) the President may, fully consistent with international law, either repudiate or maintain the agreement; (4) if the President decides to repudiate the agreement, confirmation of the appropriateness of that action should be sought in the ICJ; and (5) private litigants have no standing to contest in our courts any decision that the President may make.

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[14] The agreement by the United States to arbitrate does not mean that we have to present the case for voidness to the Tribunal rather than make that decision ourselves. The Tribunal is not given *exclusive* jurisdiction over these questions. If the agreement is void, the Tribunal has no authority. Moreover, the existence of an arbitration agreement does not preclude measures of self-help taken in good faith. *See* L. Damrosch, *Retaliation or Arbitration—or Both? The 1978 United States-France Aviation Dispute,* 74 Am. J. Int'l L. 785 (1980).

## III. Legal Considerations Arising from Nonimplementation of the International Agreement with Iran

Three important questions that would arise from a decision not to implement the executory portions of the international agreement with Iran are:

1) What would become of the $1.418 billion in the escrow account at the Bank of London (currently being held under the terms of the "Undertakings" for payment of disputed amounts between the Bank Markazi and the United States banks);

2) Can the still frozen domestic assets, including bank assets, other financial assets, and other Iranian governmental assets, be used to satisfy claims by United States nationals against Iran; and

3) What rights will the hostages and their families have to sue Iran for damages, and what possibility exists for collection of any award made?

The following discussion proceeds on the assumption that the United States, following an executive decision against implementation, secures a judgment from the ICJ or otherwise determines that the agreement is void.

### *A. The Escrow Account*

The Undertakings provide that $1.418 billion of the Fed and foreign bank assets previously transferred to the escrow account at the Bank of London shall be retained for the purpose of paying to U.S. banks any unpaid principal or interest on loans to Iran and paying to Iran any deposits, assets, or interest owing on Iranian deposits. The division is to be made by the agreement of the Bank Markazi and the appropriate U.S. bank; or, failing agreement on the amount, by reference to an international arbitration panel as the parties might agree; or failing agreement on a panel, by the Iran-United States Claims Tribunal. No other provision is made for distribution of the account.

The agreement between the banks—and the obligations and rights thereunder—is arguably severable from the international agreement. But the overall context of the bank agreement, as well as the provision of terms and conditions for the escrow account in the Undertakings document, signed by the United States, may well make this argument unpersuasive. Thus, as discussed in Part II above, the Technical Arrangement between the banks, which implements the Undertakings, might well fall within the international agreement. In the time available, we have been unable to assess the consequences of such failure.

### *B. Claims of United States Nationals*

The domestic bank assets, valued at approximately $2.2 billion, and other Iranian assets, valued at approximately $1 billion, remain in this country. The first step of the two-step transfer process—to the Fed and then to Iran—is underway, subject to litigation. The second step depends upon adherence to the Claims Settlement Agreement, including establishment of a Claims Settlement Tribunal. The Security Account is to be opened at $1 billion (taken from the $2.2 billion in domestic bank assets) and replenished by Iran with "new" money if it drops below $500 million as awards are made.

Nonimplementation would preclude funding of the Security Account. Presumably, the domestic assets could be used directly for settling the claims. The claims settlement procedure would require legislation to vest the assets and confer jurisdiction on the Foreign Claims Settlement Commission or a comparable body to hear and determine claims and make awards. One theoretical difference is that the amount that the Claims Tribunal can award has no upper limit, while the total of awards against the domestic assets would of course be limited to about $3.2 billion. It is also possible that damages assessed by the ICJ in the course of that litigation could, with congressional approval by statute, be made available for the satisfaction of private claims. The only claims now pending, however, relate to the embassy seizure and not to commercial disputes. We would add, however, that if the United States prevails in the ICJ we could expect difficulty in collecting anything on any judgment other than by self-help. Judgments of the ICJ are not directly enforceable in domestic courts.

Iran ignored the ICJ's judgment in May 1980, which ordered Iran to cease its illegal acts. The Security Council has power under Article 94 of the U.N. Charter to enforce ICJ judgments and could, in theory, impose economic sanctions, a break in diplomatic relations, or other penalties on Iran for failure to pay. Experience has shown, however, both in this case and in others, that the Security Council, for political reasons, has generally failed to support the ICJ.

As noted in Part II, if the ICJ were to confirm that the agreement is void, the United States may, in theory, ask for return of the assets paid over to Iran as well as damages to the United States and its nationals. Iran can be expected to reply, if it participates, that the assets were theirs in any event and that the United States has no right to return of the assets. There is a question whether any judgment will exceed what we already control. An ICJ judgment would serve, however, to give legitimacy to any action we may take in vesting Iranian assets already in our control.

### *C. The Hostage Claims*

In ¶ 11 of the Declaration, the United States agreed to preclude prosecution of any claim related to the seizure and detention of the hostages. We have previously expressed the view that recovery against Iran on a tort claim seemed unlikely in the absence of an amendment to the Foreign Sovereign Immunities Act, which presently provides for tort damages for personal injury or death occurring in the United States and not resulting from a discretionary function. 28 U.S.C. § 1605(a)(5). We also believe, however, that an amendment to that Act could impose retroactive tort liability on Iran. Presumably, funds to pay out on any judgments secured would have to come out of the frozen assets after vesting or out of funds, if any, collected under an ICJ judgment.

It should be noted that during the period in which the United States was pressing its claim that the agreement is void before the ICJ, we might not meet certain of our obligations under the agreement. Such "breaches" could then lead to awards against the United States by the Claims Tribunal in the unlikely event that the ICJ ultimately ruled against the United States.

### *D. Conclusion*

In the short time available, we have identified three of what we believe would be the most important issues to be confronted if the agreement with Iran were not implemented. We are concerned, however, that other problems may arise, particularly the possibility of claims brought against the United States which might result in the imposition of liability on the government. We are exploring these potential problems as quickly as possible.

Larry L. Simms
*Acting Assistant Attorney General*
*Office of Legal Counsel*

# Whether the Agreement with Iran Can Be Treated as Void in Part

**Even assuming the agreement with Iran could be regarded as void in its entirety because of the threat or use of coercion in its procurement, under international law the United States may not choose to honor some of its provisions and not others.**

**February 5, 1981**

## MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This responds to your request for our views whether the United States could choose, consistent with international law, to implement some parts of the agreement and not others, assuming, *arguendo*, that the agreement were to be regarded as void under international law.[1] We conclude that the provisions are not separable.

The primary source for international treaty law is the Vienna Convention on the Law of Treaties, which entered into force in 1980. It has been signed by both the United States and Iran, but neither has yet become a party. Ex. L., 92d Cong., 1st Sess. 1 (1971), reproduced at 8 I.L.M. 679. It is frequently cited by nonparties, however, as a statement of customary international law. At the time that the Secretary of State sent the Convention to the President for transmittal to the Senate, he said: "Although not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice." Ex. L., 92d Cong., 1st Sess. 1 (1971).

At the outset, we would observe that the agreement concluded with Iran is a "treaty" within the meaning of the Convention even though it is designated as an executive agreement for purposes of domestic law. The Convention applies to any written international agreement concluded between states which is governed by international law. Art. 2(1)(a).

Under the Vienna Convention, specifically Article 44(5), treaties which are void under Article 52[2] may be maintained by the state to which coercion was applied in violation of that Article but "no separation of the provisions of the treaty is permitted." The International

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[1] For example, Article 52 of the Vienna Convention on the Law of Treaties states: "A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."

[2] We assume for present purposes that Article 52 would apply here to void the agreement with Iran.

Law Commission said that such an approach would be necessary to be consistent with its position on coercion in Article 52:

> Only thus, in the opinion of the Commission, would it be possible to ensure that the coerced State, when deciding upon its future treaty relations with the State which had coerced it, would be able to do so in a position of full freedom from the coercion.

[1966] 2 Y.B. Int'l L. Comm'n 169, 239 (hereafter 1966 I.L.C. Yearbook).

An argument could be made that the flat rule of Article 44(b) represents progressive development rather than existing international law and that at least in some cases separation should be permitted. *See* 1966 I.L.C. Yearbook at 238; T. O. Elias, The Modern Law of Treaties 137 ff. (1974); McNair, The Law of Treaties 474 ff. (1961). It would be difficult, however, to separate the principle of Article 52, which has been recognized by the International Court of Justice (ICJ) as representing contemporary international law,[3] and that in Article 44(5) of the Convention. Thus, if the United States honors the agreement, it has a legal duty under international law to honor all of it, and if it is void, all of it is void.

If the United States affirms the agreement but fails to implement part of the agreement, such as that relating to the estate of the Shah, Iran has several options:

(1) Iran might choose to secure a determination of this matter from the Iran-United States Claims Tribunal, as established under the Claims Settlement Agreement. The Tribunal is given jurisdiction "over any dispute as to the interpretation or performance of any provision" of the Declaration. Iran may not be able to prove damages if the United States does not intervene in Iran's suit against the Shah's estate. The Government is committed to argue that sovereign immunity and the act of state doctrine do not preclude the suit. A domestic court may decide these issues in Iran's favor even if the United States does not participate. Conversely, if Iran loses it would only be conjecture as to how the Government's failure to follow the agreement affected the result.

(2) Iran may invoke the breach as a ground for terminating the agreement. This right is independent of any claim for reparation against the United States. T.O. Elias, *supra,* at 114; Restatement of Foreign Relations Law of the United States (Revised), tentative draft No. 1, § 345, comment e (1980).

Article 60 of the Vienna Convention provides: "A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part." A material breach involves "the violation of a provision essential to the accomplishment of the object or purpose of the treaty."[4] For example, the fact that the United States might regard the commitments made by us regarding the assets of the Shah as peripheral rather than essential to the agreement would not be determinative, since Iran quite clearly considered these commitments as vital to any agreement. The International Law Commission spelled this out in its commentary on this article:

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[3] *Fisheries Jurisdiction Case,* 1973 I.C.J. 1 at ¶ 24.

> Some authorities have in the past seemed to assume that any breach of any provision would suffice to justify the denunciation of the treaty. The Commission, however, was unanimous that the right to terminate or suspend must be limited to cases where the breach is of a serious character. It preferred the term "material" to "fundamental" to express the kind of breach which is required. The word "fundamental" might be understood as meaning that only the violation of a provision directly touching the *central* purposes of the treaty can ever justify the other party in terminating the treaty. But other provisions considered by a party to be essential to the effective execution of the treaty may have been very material in inducing it to enter into the treaty at all, even though these provisions may be of an ancillary character.

1966 I.L.C. Yearbook at 255 (emphasis in original).

An argument could be made that since Article II(3) of the Claims Settlement Agreement provides the Iran-United States Claims Tribunal with jurisdiction to hear claims concerning "performance" of the agreement, Iran's remedy should be limited to the Tribunal. The agreement does not, however, purport to make arbitration the *exclusive* remedy and normally a provision for arbitration does not preclude retaliation or termination. *Case concerning the Air Services Agreement of 27 March 1946* (*United States* v. *France*), 54 I.L.R. 304 (1979); Restatement, *supra,* § 345, comment e; Damrosch, *Retaliation or Arbitration—or Both? The 1978 United States-France Aviation Dispute,* 74 Am. J. Int'l L. 785 (1980). If we believed that there had been no material breach and that Iran had arbitrarily repudiated the agreement we could, of course, bring that issue to the Tribunal if Iran had not already done so.

(3) Independent of its right to suspend or terminate the agreement, Iran could invoke some other form of reprisal not involving force, 1966 I.L.C. Yearbook at 253–54, 255, proportional to the breach of the United States. L. Oppenheim, 2 International Law 115 (6th ed. H. Lauterpracht 1944).

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[4] The ICJ has said that the rules quoted are part of customary international law. *Namibia Case,* 1971 I.C.J. 16, 46–7.

In conclusion, we note that any breach of the agreement could set in motion a serious train of consequences. Great care should thus be taken in considering any options to be pursued.

**LARRY L. SIMMS**
*Acting Assistant Attorney General*
*Office of Legal Counsel*

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